IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

JOHN HARMER, RAYMOND P. GAUER, SALVATORE MAIORINO,

Petitioners,

vs.

A MOTION PICTURE FILM ENTITLED "DEEP THROAT" (35 mm. Color, English Sound Track); VANGUARD FILMS, INC., GERARD DAMIANO a.k.a. JERRY GERARD; LOUIS PERAINO a.k.a. LOU PERRY; GERARD DAMIANO FILM PRODUCTIONS, INC.; PHIL PARISI; AQUARIUS RELEASING CO., INC.; TERRY LEVINE; PUSSYCAT THEATRES, INC.; VINCENT MIRANDA; FRANK N. SELTZER, WALTER SELTZER; GEORGE GLASS; JAY FINEBERG; JACK CHAZAN, WALNUT PROPERTIES, INC.; ERNEST RICORD; BETTE LOU LEDFORD; ROBERT MATTIAS; JIM JOHNSON; PUSSYCAT HOLLYWOOD, PUSSYCAT (HOLLYWOOD) THEATRE, DOES 1 THROUGH 11.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL SECOND APPELLATE DISTRICT (DIV. 1)

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

COURT OF APPEAL,

SECOND APPELLATE DISTRICT (DIV. 1)

The Petitioners, John Harmer, Raymond P. Gauer and Salvatore Maiorino respectfully pray

that a writ of certiorari issue to review the judgment by the Court of Appeal, Second Appellate District, Division One; which affirmed Los Angeles County Superior Court Judge David A. Thomas' orders, dated Sept. 4, 1973 and Sept. 21, 1973, denying petitioners' motion for a preliminary injunction and sustaining the general demurrer to the Complaint in the trial court below. The California Supreme Court entered an order on February 3, 1977, denying a petition for hearing, without writing an opinion.

OPINIONS BELOW

A copy of Judge Thomas' informal memorandum and order, dated Sept. 4, 1973, and his informal memorandum and order, dated September 21, 1973, is attached hereto at Appendix A-1 through A-14

A copy of the unreported opinion of the Court of Appeal, Second Appellate District, Division One, filed on December 10, 1976, is attached hereto at Appendix A-15through A-32.

A copy of the California Supreme Court order of Feb. 3, 1977, denying the petition for hearing, is attached hereto at Appendix A-33.

JURISDICTION

The order of the California Supreme Court denying the petition for hearing was entered on February 3, 1977. The petition for certiorari herein was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Whether the motion picture film "Deep Throat" is hard-core pornography under federal standards [1/] and whether a substantial federal question is raised, when a state judicial system denies a state resident access to the state court to prevent the exhibition of such film in his local community, where such film is in its fifth year of exhibition in that community at

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1/ A time and motion study of the film "Deep Throat" consisting of a chronological series of still photographs, timed in their relative order of appearance, depicting the sexual conduct visually portrayed on the motion picture screen of the Pussycat Hollywood Theater (being a 4-1 photo-reduction of the time and motion study of "Deep Throat" which was introduced as Exhibit "1" on Plaintiffs' Motion for a Preliminary Injunction) was pleaded specially as Exhibit "A" to the Complaint, and a "Continuity" containing photographs and the dialogue of said film was pleaded specially at Exhibit "B" to said Complaint.

the time of the final decision of the highest court in the state denying appellate review of the trial court ruling.

2. Whether the facts specifically pleaded in the Complaint indisputably established petitioners' right to a preliminary injunction, and whether in denying a prompt judicial forum in which to contest the right of the defendants to publicly exhibit for profit the hard-core sexual conduct depicted in the motion picture film described in the complaint, and exhibited continuously for eight months prior to the filing of the action, the judicial system of the State of California has deprived the petitioners as citizens of the United States of:

(1) due process of law and equal protection of the law, and

(2) the police power which is inherent in municipal authority, and

(3) one of the fundamental civil rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common decency" and to live in a community whose public morals, moral values, and environment are free from the illegal, degrading, and corrupting influences of such patently hard-core pornography

where it is common knowledge and the subject

of judicial notice that, at the time of such Court's denial of the petition for rehearing on January 4, 1977, the hard-core film "Deep Throat", which was "in custodia legis" in the within "in rem" action, was presently being exhibited in Los Angeles City and County, and had been exhibited throughout Los Angeles County continuously for the past five years (1973-1977), without the District Attorney of Los Angeles County or the City Attorney of the City of Los Angeles having made any effort to challenge such public nuisance in the Courtroom.[2/]

3. Whether it was a denial of due process of law for the Court of Appeal below to rule in the cause herein that (a) a cause of action has not been stated, and (b) that a cause of action cannot be stated by amending the pleadings, where Division 3 of the same Court has ruled in a companion case entitled John Harmer, Raymond P. Gauer, Richard Walton v. A Motion Picture Film Entitled "The Devil in Miss Jones" et al. (unreported), in an appeal taken from the sustaining of a demurrer to a cause of action involving identical pleadings and similar subject matter, that the cause should be remanded to the trial court with instructions

2/ See footnote 4 on page 8 infra.

to grant plaintiffs time within which to file an amended complaint, in that it appeared to that Court that plaintiffs might amend the complaint to state (1) a controversy and standing for a cause of action for declaratory relief, and (2) special injury sufficient to justify the maintenance of a private suit to abate a public nuisance, and where the California Supreme Court has refused to grant a hearing to resolve the conflict that exists between the two opinions.3/

3/ A conflict exists between the decision of the Court of Appeal, Second Appellate District (Division 3) in John Harmer, Raymond P. Gauer, Richard Walton v. A Motion Picture Film Entitled "The Devil in Miss Jones" et al., 2d Civ 43778, decided Sept. 17, 1976 (unreported), petition for hearing denied on Nov. 12, 1976, under which the cause of action was remanded to the trial court with instructions to grant plaintiffs time within which to file an amended complaint, and the decision of the Court of Appeal, Second Appellate District (Division 1) in John Harmer, Raymond P. Gauer, Salvatore Maiorino v. A Motion Picture Film Entitled "Deep Throat" et al., 2d Civ 43913, decided Dec. 10, 1976 (unreported), petition for hearing denied on Feb. 3, 1977, which held to the contrary and affirmed the trial court's ruling which sustained the general demurrer to the cause of action below. A copy of the unreported opinion in the "Deep Throat" case herein is attached to this Petition at Appendix "A" and a copy of the unreported opinion in "The Devil in Miss Jones" case is attached to this petition at Appendix "B".

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the First and Tenth Amendments to the Constitution are set forth in Appendix "C".

STATUTORY PROVISIONS INVOLVED

Chapter 7.5 of the Penal Code of California prohibits the sale, distribution, etc. of "obscene matter". Penal Code section 311(a), defining "obscene matter", is printed at Appendix "D".

Sections 3479 and 3480 of the Civil Code of California, containing the provisions defining what constitutes a civil public nuisance, are set forth at Appendix "E".

Sections 3493 and 3495 of the California Civil Code, authorizing the abatement of a public nuisance by a "private person" by a civil action and by other means (self-help) is printed at Appendix "F".

Section 731 of the Code of Civil Procedure of California, authorizing the filing of a civil public nuisance abatement action "by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a

nuisance" is printed at Appendix "G".

Section 527 of the Code of Civil Procedure of California, containing the provisions relating to the granting of preliminary injunctions, is printed at Appendix "H".

Rule 977 of the California Rules of Court, which prevents the citation of unreported decisions as precedent, is printed at Appendix "I".

STATEMENT OF THE CASE

For 3½ years, petitioners have been denied access to the California Courts in their efforts, as plaintiffs in the trial court below, to abate as a public nuisance, a hard-core pornographic motion picture film ("Deep Throat") which presently is, for the past five years has been, and is about to be, exhibited on the screen of a public theater in the County of the petitioners' residence.[4/] During that period of time, and pending

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4/ In a Petition for Rehearing filed with the Court of Appeal on Dec. 20, 1976, petitioners noted at page 3:

> The cause which is now before this Court does not exist in a vacuum. The Court is daily made aware of the fact that "Deep Throat" and "The Devil in Miss Jones" have been exhibited throughout Los Angeles County for the past five years and neither the District Attorney of Los Angeles County nor the City Attorney of Los Angeles have made any effort to challenge those public nuisances in the Courtroom. On this point, see the copy of page 65 of the Calendar section of the Los Angeles Times newspaper for Sunday, Dec. 19, 1976,...
>
> This advertisement, by the defendants-appellants herein, broadcasts the facts (1) that these two films are "Now in its 5th year" and (2) the defendants - appellees have expanded their operations "to our brand new Pussycat Theatre in the San Fernando Valley and Riverside." Appellants request this Court to take judicial notice of these facts...
>
> Appellants' counsel does not wish to appear disrespectful to this Court, but he would not be providing Mr. Maiorino with adequate representation were he not to suggest to this Court on this petition for a rehearing that, were defendants - appellees to move these films to a theater within 300 feet of the residences of any one of the justices on this court, the members of this Court would be hard put to explain to their neighbors why the Courts would not afford them relief under such circumstances... Success, today, with "Deep Throat" depends not so much on "good attorneys" as it does on the willingness of good justices of this Court to permit this unfortunate phenomenon to continue without abatement.

the determination of this appeal, petitioners have, on four separate occasions, attempted and been denied extraordinary relief by way of writs of mandate. See Statement of Facts at page 36 infra.

In the Complaint on file below, Petitioners pleaded factual obscenity (i.e., "indecency") specially, by attaching an accurate time and motion study and continuity of the film "Deep Throat" to the Complaint as exhibits and making the same a part thereof by reference (see Exhibits "A" and "B" to the Complaint and Exhibit "1" on the Motion for Preliminary Injunction), so that an issue of law as to the sufficiency of the accusatory pleading might be placed before the trial court, which could be tested by the Defendants' demurrer. Ratner v. Municipal Court of Los Angeles Judicial District, County of Los Angeles, 256 Cal.App. 2d 925, 64 Cal.Rptr. 500, 502, 503 (Dec. 14, 1967). The time and motion study which is incorporated into the Complaint by reference and was admitted into evidence as Exhibit "1" consists of a chronological series of photographs timed in their relative order of appearance, depicting fairly and accurately the sexual conduct visually portrayed on the motion picture screen by such film. The "Continuity" which is incorporated into the Complaint is a reproduction of the sound portion of the subject film, identifying the actors, their roles and what they say as the film progresses. Visual screen depictions are recorded by still camera

photographs reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of time.

When such specially pleaded matters are compared with the subject matter in the 26-minute silent motion picture film, "Un Chant d' Amour" adjudged obscene in Landau v. Fording, 245 Cal. App. 2d 820, 54 Cal.Rptr. 177 (Oct. 24, 1966), and affirmed on the merits in Landau v. Fording, 388 U.S. 456, 18 L.Ed. 2d 1317, 87 S.Ct. 2109 (June 12, 1967), it is difficult to understand how such a state of public indecency can come into existence in a short period of 10 years.

Petitioners submit that one reason for the proliferation of such hard-core pornography can be found in the Reply of Commissioner Charles H. Keating, Jr., dated Aug. 16, 1970 to the First Draft of the Legal Panel Report of the Commission on Obscenity and Pornography, Appendix "B" of which contains a 40-page continuity on the 16mm motion picture film, "A Report On The United States Supreme Court and Its Recent Decisions in Obscenity Cases," presented to the Senate relative to the nomination of Justice Fortas. After the first showing of the 16mm motion picture film

work print to a group of about 20 U.S. Senators on Sept. 20, 1970, one of the questions asked was "What was responsible for the great change in the motion picture area?" To answer that inquiry, the following historical event [4a/] was added to that documentary.

> "Justice Brennan applied what he called 'national standards' to hold the film 'The Lovers' not obscene -- a motion picture which for the first time was allowed to depict scenes of sexual intercourse -- in this instance, in a bed and bath between the wife

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4a/At the core of Justice Brennan's badly conceived judgment in Jacobellis (concurred in by Justice Goldberg) is his faulty premise that the motion picture industry would be satisfied with showing a little bit of sexual intercourse and a little bit of lewdness. The "runaway" porno film operation which has developed inthe succeeding 10 years has erected a monument to that blunder. Compare the differing philosophical view of Federal District Court Judge Goodman, expressed in U.S. v. Two Obscene Books 99 F.Supp 760, 763 (Sept. 17, 1951), affirmed in Besig v. U.S. 208 F.2d 142 (Oct. 23, 1953) (holding "Tropic of Cancer" and "Tropic of Capricorn" to be obscene):

> "These episodes or passages are stated to constitute about 13% of the total number of pages in the book. This, it is asserted, is an insufficient quantity upon which to base a finding of obscenity. The Court must reject any such quantitative test. It is akin to the excuse of Midshipman Easy's servant girl that her illegitimate child was "such a little one".

> and a casual house guest. A jury and the State of Ohio, speaking through three of its courts and 12 of its Ohio Justices, however, had held otherwise".

The complaint below also seeks forfeiture of said motion picture film as contraband, together with an accounting and surrender of all of the monetary consideration received as admission price to such unlawful exhibitions. The Defendants in said action are the motion picture film, entitled "Deep Throat", being a 35mm color film with pornographic content, and the Pussycat Hollywood Theatre, 7734 Santa Monica Blvd., where that film is playing in Los Angeles County, and all persons having an interest in said film and said theater.

The rationale for the accounting and surrender of unlawful profit relief requested, is that the filing and service of process of the

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It took the State of Ohio 10 years to repair the damage brought about by Justice Brennan's subjective judgment in Jacobellis. See Ohio ex rel Keating v. A Motion Picture Film entitled "Vixen" 27 Ohio St2d, 278, 272 NE2d, 137 as adhered to by the Ohio Supreme Court in 35 Ohio St2d, 215, 301 N.E.2d 880, (Sept. 26, 1973). By then Justice Brennan had again changed his mind. See, in particular, the rebuke to Brennan's obscenity judgments, expressed by Justice White in his separate opinion in J-R Distributors, Inc. et al v. Washington 41 L.Ed2d 1166 and 1167 (July 25, 1974).

within "in rem" public nuisance abatement action placed both the film and the theater (real estate) itself "in custodia legis", see Toucey v. New York Liberty Ins. Co., 314 U.S. 118, 86 L.Ed. 100, 62 S.Ct. 139 (1941) and that the inherent power and duty of a court "to control and prevent the abuse of its process", see People of the State of California v. Superior Court of Orange County, 28 Cal. App. 3d, 600, 104 Cal.Rptr. 876, 882-885; People of the State of Colorado v. Stewart, 553 P.2d 74 (May 20, 1976) requires a surrender of the unlawful receipts so as to prevent an injustice. The trial court should have stopped the unlawful exhibitions in 1973 and the appellees should not be permitted to gain an unlawful advantage thereby. See State ex rel. Ewing v. "Without A Stitch", 37 Ohio St. 2d 95, 307 N.E. 2d 911, 918, appeal dismissed for want of a substantial federal question 421 U.S. 923, 95 S.Ct. 1649, 44 L.Ed. 2d 82. If this Court allows the judgment of the Court of Appeal to stand, it will thereby, sub silentio, condone an illegal and outrageous business, and prevent the application of fundamental equitable principles which are sorely needed as remedies in the suppression of unlawful obscenity nuisances.

STATEMENT OF FACTS

On August 3, 1973, Petitioners commenced a civil action in the Superior Court of Los Angeles County with the filing of the following papers:

1. A Complaint in Equity to Abate Public Nuisances, for Declaratory Judgments and Forfeitures, being John Harmer, Raymond P. Gauer, Salvatore Maiorino vs. A Motion Picture Film Entitled "Deep Throat" (35 mm. Color, English Sound Track) et al., No. 63814 (See Clerk's Transcript, hereinafter designated C.T., at pp. 1-78).

2. Points and Authorities in Support of Complaint in Equity to Abate Public Nuisances, Declare Forfeitures, and For Declaratory Judgments (C.T. 79-210).

3. Motion For A Preliminary Injunction (Temporary Writ of Injunction) to Abate a Public and Private Nuisance, and For a Declaration of Forfeiture (C.T. 211-213); and

4. Notice of Motion For a Preliminary Injunction with a trial date of August 28, 1973 at 09:00 A.M., in Department 85 of said Court (C.T. 214-215).

In said civil action petitioners, as residents and real property owners in Los Angeles County sought to abate as a public nuisance the Pussy-

cat Hollywood Theatre, 7734 Santa Monica Blvd., in Los Angeles County wherein the hard-core pornographic film "Deep Throat" had been exhibited continuously since on or about Nov. 30, 1972 and the positive motion picture print used by the defendant operators of said theatre as the means of exhibiting said motion picture film at that theatre. A time and motion study of the film "Deep Throat" consisting of a chronological series of still photographs, timed in their relative order of appearance, depicting the sexual conduct visually portrayed on the motion picture screen of the Pussycat Hollywood Theatre was pleaded specially at Exhibit "A" to said Complaint, and a "Continuity" containing photographs and the dialogue of said film was pleaded specially at Exhibit "B" to said Complaint. A summons was issued and service of process was commenced as to all defendants named in said action.

On August 15, 1973, a copy of the Summons, Complaint, Points and Authorities, Motion for Preliminary Injunction and Notice of Motion For Preliminary Injunction were served personally on the following Defendants: Vincent Miranda, Walnut Properties, Inc., Pussycat Hollywood, Pussycat Theatres, Inc. On August 17, 1973, a copy of the Summons, Complaint, Points and Authorities,

Motion For Preliminary Injunction and Notice of Motion For A Preliminary Injunction were served personally on Defendant Jack Chazan, alleged to be the owner of the real property upon which the Pussycat Hollywood Theatre is located. On August 24, 1973, Defendant Pussycat Theatres, Inc., appeared by attorney David M. Brown and filed a Memorandum of Points and Authorities in Opposition to Motion For Preliminary Injunction (C.T. 216-257).

On August 28, 1973 and August 29, 1973, petitioners' Motion for a Preliminary Injunction came on for a hearing in Department 85 of the Los Angeles Superior Court before the Honorable David A. Thomas, at which David M. Brown appeared as counsel for Defendant Pussycat Theatres, Inc. At said hearing petitioners moved that the Complaint on file with the Court be admitted into evidence and the same was received into evidence less Exhibit "A" (Time and Motion Study) and Exhibit "B" (Continuity). (See Reporter's Transcript, referred to herein "R.T." at pages 10-12).

On August 28, 1973, Kenneth Miles was called as a witness for petitioners (R.T. 52-55) and stated that he had seen the motion picture film "Deep Throat" at the Pussycat Theatre in Hollywood on two occasions, August 3, 1973, and August 16, 1973; that on August 3rd he participated

in the service of process and on that occasion entered the theatre and served a subpoena on the projectionist, Alex Collantes, and a summons on another person who identified himself as the manager; that on that occasion he viewed the program, being the motion picture film "Deep Throat", a short cartoon, coming attractions and a short subject entitled "Good Morning", which lasted about one and one-half to two hours; that previous to August 16, 1973, he had made arrangements for a County Marshal to serve a subpoena duces tecum on the manager and on the projectionist on August 16; that around noon on August 16, when the theatre opened, he observed the Marshal knock on the door, being allowed to enter by a person who said he was the manager, and observed the Marshal to serve a subpoena on the same individual he had previously served, who claimed to be the projectionist, and on the person who had admitted the Marshal to the theatre; that thereafter he remained in the main part of the theatre for one and one-half to two hours and again watched "Deep Throat" and the others. A stipulation was thereafter reached between counsel as to what the balance of Miles' testimony would be (R.T. 56), namely: That the photographs on pages 1-16 of Plaintiffs' "1" constituted a fair and accurate representation of photographs he saw

screened at the Pussycat (Hollywood) on August 3 and 16, 1973, and that the sound track transcription in Exhibit "B" to the Complaint was a fair and accurate representation of the language and sound appearing on the sound track of the program insofar as that was reproducible from a cassette recording of the same.

A stipulation was reached as to what the testimony of Petitioners' attorney (Mr. Clancy) would be (R.T. 56), namely: That he supervised the preparation of the Time-Motion Study (Exhibit "A" to Complaint) and the Continuity (Exhibit "B" to the Complaint); that he had previously seen the film "Deep Throat" in Washington, D.C., and had made a Time-Motion Study of that film at that time; that the making of the Time-Motion Study was supervised by him; that the Time-Motion Study was made using a Craig (2605) cassette tape recorder and a Bell & Howell 200 Series motion picture camera which also took single still photographs; that the camera is mounted in a sound-proof box with two microphones, one of which records the clicks on the camera when still pictures are taken, and the other which records the sound track on the screen; that both sounds are fed into a cassette tape recorder and recorded thereon; that the Bell & Howell camera uses a cartridge of 50 foot, No. 2475, recording

film, ASA 1000, which takes 40 still photographs per foot or a total of 2000 pictures per cartridge and that the photographs were taken in the following manner; that an attempt was made to take at least one picture of every scene and to take still photos with no greater intervals than eight seconds; that on June 21, 1973, he sent Mr. Morelli, his assistant, to the Pussycat (Hollywood) Theatre with a loaded camera and two recorders and two cassettes; that Mr. Morelli returned and gave him the negatives in the cartridge and the sound track; that he had the negative films developed and printed as enlarged 70 mm. prints which appear on Plaintiffs' "1" as positive prints; that the Time-Motion Study which he had made of "Deep Throat" in Washington, D.C., is in substantial agreement with the one made at the Hollywood Pussycat and that he checked the timing for the latter for accuracy; that the photographs, numbered 1 thru 1117, appear in sequential order on one roll of negative film and the order of the 1117 positive 70 mm. prints appearing on Plaintiffs' "1" were checked with and are in the same order as the photographs on the negative film; that the timing was accomplished as follows: The cassette tape recording, containing the sound track of the Pussycat (Hollywood) program and the 1117 camera clicks

recorded in the Pussycat (Hollywood) Theatre on June 21, 1973, was played back and re-recorded on a second cassette with the timing operations superimposed thereon; that when such playback and re-recording was commenced, a stop watch was started and when each camera click was heard, the stop watch timing in seconds was called out audibly so that the second cassette tape recorded the sound track from the film, the click from the camera, and the exact timing in seconds as read on the stop watch; that upon completion of the timing operation, the second cassette tape was replayed and the numerical sequence and timing for each of the 1117 clicks were tabulated on a form and thereafter transferred onto the labels which were superimposed as legends on each of the pictures in Plaintiffs' "1", which were mounted on 16 pages, comprising Plaintiffs' "1"; that in an eight second interval between still photographs with a motion picture camera speed of 16 frames per second, 16 times 8 single projections would appear on the theatre screen, two of which were photographed; that the film "Deep Throat" as shown was in color whereas the time-motion photographs were black and white.

The Time-Motion Study was offered by petitioners' counsel as primary evidence which was not subject to the best evidence rule, being a

timed depiction of the sexual scenes appearing on the screen which offered something in addition to what the film itself would present (R.T. 64). Thereafter, arguments were had as to the accuracy of portrayal of sexual conduct in relation to the totality of the motion picture film. (R.T. 60-64) Plaintiffs' "1" was received in evidence, subject to reconsideration by the Court on the "best evidence" objection. (R.T. 66) Salvatori Maiorino, Plaintiff in the action, was called as a witness for Plaintiffs (R.T. 66) and testified as follows: That the Pussycat (Hollywood) Theatre was located on the south side of Santa Monica Blvd., about 50 feet west of the intersection of Santa Monica Blvd., and Spaulding Avenue; that he presently owns and resides on the property known as 1039 North Spaulding Avenue, located 350 feet south of Santa Monica Blvd.; (R.T. 67) that he has lived at that address since September of 1955; (R.T. 68) that when he purchased the residence in 1955 for $19,700 he had selected the neighborhood as one which was acceptable to a family environment; (R.T. 68) that at that time the theatre now known as the Hollywood Pussycat was a nice neighborhood theatre; (R.T. 69) that he had not seen the motion picture film "Deep Throat" but had seen the photographic representations in Exhibit "A" to the Complaint

and was personally offended and embarrassed by the presence and playing of "Deep Throat" at the Pussycat (Hollywood) Theatre; (R.T. 70) that the change was subtle; (R.T. 71) that first came the establishments where people would come in and photograph nude women and rent cameras or film, then came places where one could view pornographic-type films and then the massage parlor; that the most recent change was the so-called "Sexual Intercourse Center" adjacent to the Puss 'N Boots on the corner of Santa Monica Blvd. and Spaulding Avenue, which began advertising its business in June of 1973 with signs reading, "Sexual Intercourse Center" and "Have Intercourse With A Live Girl" and "Girls and Waterbeds"; (R.T. 72) that other similar businesses appeared in the immediate neighborhood subsequent to the first showing in November of 1972, such as the one on Santa Monica Blvd. between Ogden and Genesee, which used to be a bookstore; that advertisements and news accounts appeared on radio and TV concerning the exhibition of "Deep Throat" at the Pussycat (Hollywood) Theatre; that he heard a broadcast of an incident at the Intercourse Center regarding an arrest for prostitution which embarrassed him. Objections to the questions: "Do you regard the reporting of such an incident in your neighborhood as a matter of

public scandal" and "Do you regard the exhibition of the motion picture film 'Deep Throat' as a public nuisance insofar as you are concerned" were sustained on the ground that they were leading questions. (R.T. 76) He stated that his family consisted of his wife and two minor boys, ages 12 and 16, and that he was on the verge of selling his property until this action brought some hope. (R.T. 77).

On cross-examination Plaintiff Maiorino stated he had not seen the film "Deep Throat" at the Hollywood Pussycat Theatre; (R.T. 78) that he observed persons outside waiting to get in; that he observed couples, men and women, entering the theatre during the exhibition of "Deep Throat"; (R.T. 78-79) that the only "new" business he knew of were the two mentioned above; that the "Sexual Intercourse Center" was not the "Sexual Catharsis Center", the latter being on Santa Monica Blvd.; that the sign "Sexual Intercourse Center" referred to was painted over the day after an arrest was made for prostitution; (R.T. 79-80) that he has never been inside the "Sexual Intercourse Center" except in 1957 or 1958 when that property was part of a restaurant called "The Golden Lion"; that the change in the character of the neighborhood began about six to seven years ago with the introduction of

businesses such as massage parlors, model studios, places selling sexually oriented books and films, theaters exhibiting pornographic films, and businesses using as outside advertising, pictures he thought were and are pornographic; that in the last six to nine months, (R.T. 82) the change has doubled its pace; that other changes took place since "Deep Throat" started showing, such as a woman living across the street in an apartment being pursued by a man in a car; (R.T. 83) that he had discussed the matter of deterioration of the neighborhood with the O'Sheas and Mrs. Epstein, who owned the property next to him and behind the theatre; who had expressed a desire to move; (R.T. 84) that people were catcalling down the street during the 15 minute intermission between successive two hour showings; (R.T. 90) that during that period his children hear the comments on the movie being made by the patrons, male and female, and know what's going on; that such language could be heard by his children from inside his house; (R.T. 84) that he objects to the type of language and the type of remarks and the use of language which is unfit; (R.T. 89) that he reported the use of such language to the Sheriff's Department, but had not observed any arrest for disturbing the peace or use of abusive language because he didn't

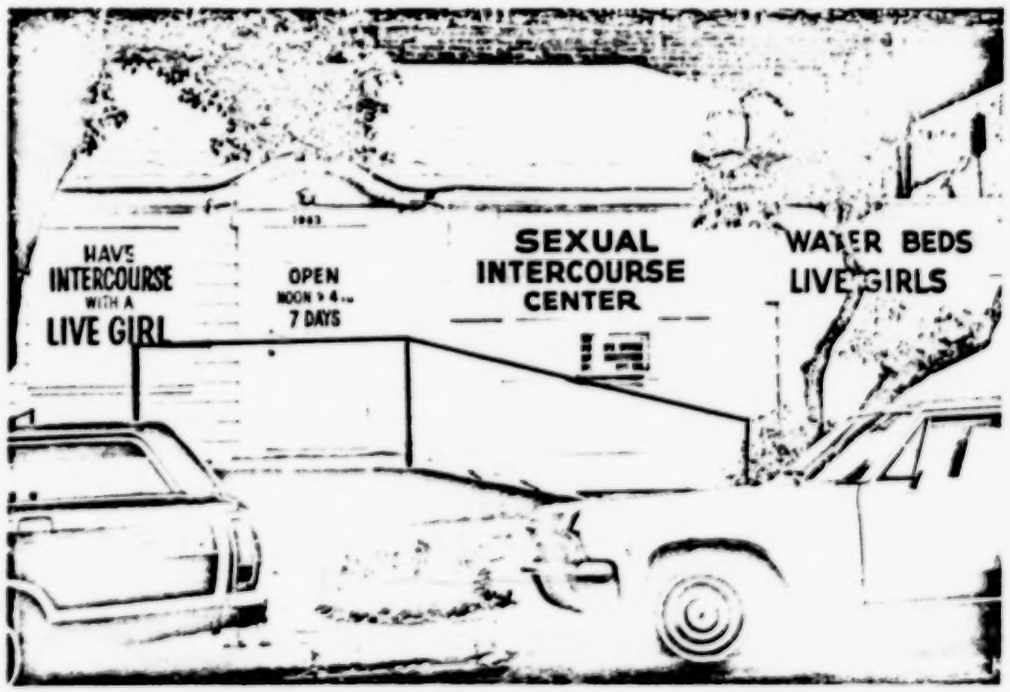
think anyone would come out of their house to quell any type of language; (R.T. 90) that he had made inquiries of the possibility of a citizen's arrest; (R.T. 90) that he had tried to quell the language but that it just resulted in more cat-calling and shouting. (R.T. 90)

On re-direct Maiorino stated that when he arrived in the area in 1955 the Puss 'N Boots was a restaurant called The Golden Lion (R.T. 91) and that the Sexual Intercourse Center was the kitchen for the restaurant; (R.T. 92) that in 1955 the place occupied by the Sexual Catharsis Center used to be a pub; that it now attracts a different type of clientele by their advertising "Sexual Catharsis." (R.T. 92) The matter was adjourned at 2:45 P.M.

On Wednesday, August 29, 1973, the re-cross-examination was resumed. Mr. Maiorino testified that he had become a Plaintiff after Mr. Gauer called him and asked if he would want to become a party to this action (R.T. 99).

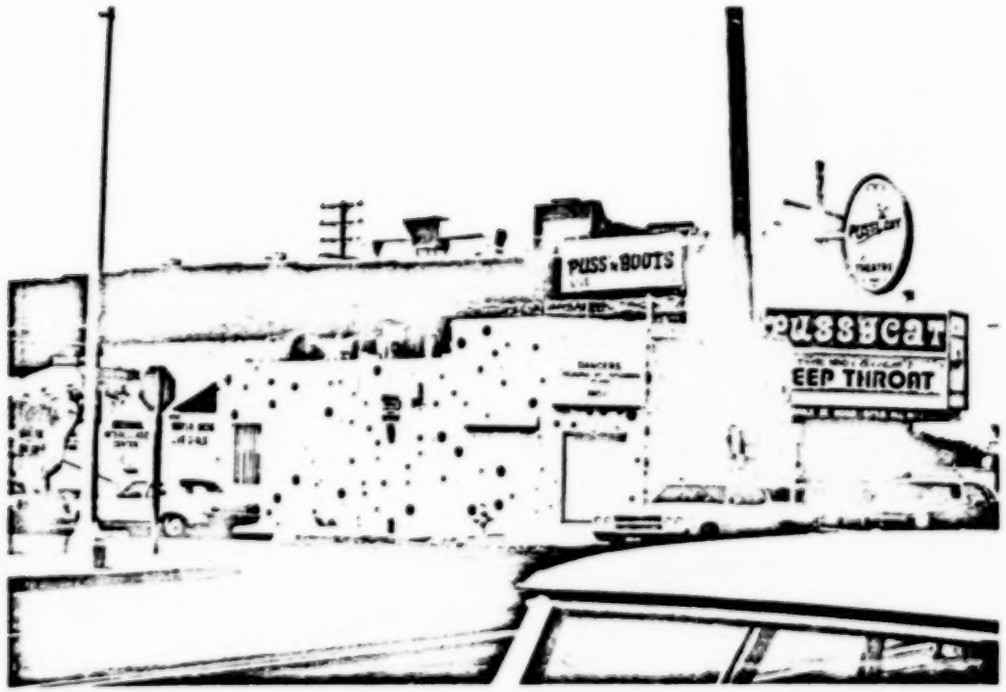
On re-direct, Mr. Maiorino identified four photographs comprising Plaintiffs' Exhibit "2". He identified the first photograph as the "Sexual Intercourse Center", located about 250 feet from his home and about 60 feet from the intersection of Spaulding and Santa Monica, (R.T. 100) and stated that such business began on either

June 15th or June 22nd, 1973, which was the day the signs "Sexual Intercourse Center", "Have Intercourse With A Live Girl", and "Waterbeds Live Girls" went up. (R.T. 100). He identified the



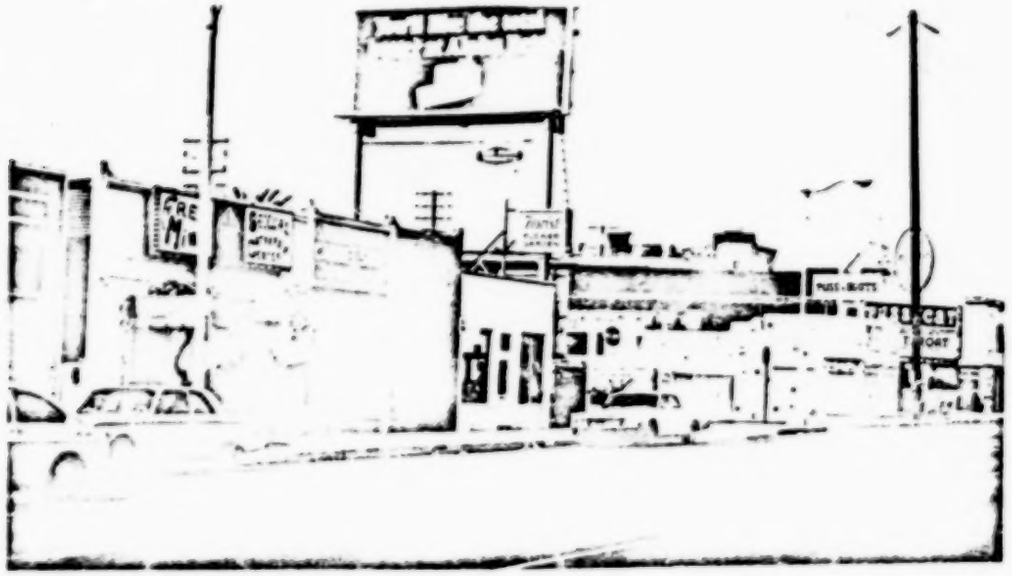
second photograph "as the southwest corner of Santa Monica and Spaulding with the Pussycat Theater on Santa Monica Blvd. and the Puss 'N Boots next to the theatre and the Sexual Intercourse Center next to the Puss 'N Boots. (R.T. 101). He identified the marquee on the Pussycat Theatre as "Hundred Percent Gulp - Deep Throat" and stated that the sign went up when the show

started and is still up there now. (R.T. 101). He stated that the sign was offensive to him; that "it implies - I don't know how to describe it - I guess oral copulation or oral sodomy . . . so there is nothing else you can define what this Hundred Percent Gulp 'Deep Throat' - what they imply. I don't think it leaves anything to anyone's imagination . . . ." (R.T. 102).



He identified the third photograph as a view of the intersection of Spaulding and Santa Monica showing the Pussycat Theatre, the Puss

'N Boots and the place which formerly was a pub serving beer but which no more than six months ago became the Sexual Catharsis Center. (R.T. 102).



He identified the fourth photograph as the

bookstore at the intersection of Santa Monica and Ogden, referred to by him on direct, which in May of 1973 became known as "Kama Sutra - Phrontistory." (R.T. 103).

On further re-cross he stated he had never been inside the "Sexual Catharsis Center" or the Kama Sutra business; (R.T. 104) that his knowledge of that business was derived from the sign "Exotic Girls" and the girls standing outside very scantily dressed in conversations with passerbys. That he wouldn't be able to answer truthfully whether "Deep Throat" or the massage parlor started first because the timing was so close; (R.T. 105) that before the film "Deep Throat" appeared, model studios and bookstores selling sexually oriented books and/or magazines and film arcades showing sexually oriented films existed in the neighborhood before "Deep Throat" began showing, but not before the Pussycat Theatre came and started their advertisement and drew that type of clientele. (R.T. 106).

At the conclusion of Mr. Maiorino's testimony

Defendants' Motion to Strike his testimony (R.T. 107) was denied (R.T. 112) and Exhibit 2, parts 1, 2, 3 and 4 were admitted into evidence. (R.T. 113). Plaintiffs offered in evidence the film "Deep Throat", under the subpoena duces tecum for a viewing by the Court, (R.T. 113) or in absence thereof, the admission into evidence of Exhibit "B" to the Complaint - the Continuity (R.T. 113). An objection to the introduction of the same on the grounds of the best evidence was taken under submission. (R.T. 113). Defense counsel Brown asked the Court for leave to introduce evidence on nonobscenity if the Court got to that issue, and the same was granted, the Court saying: "This does not discount the argument of the plaintiffs that from the evidence heretofore submitted, this may be deemed obscene, per se, for it is possible that will be a ruling . . . ." "If it gets down to, Mr. Brown, the factual issue of obscenity beyond obscenity, per se, I will permit you to present evidence." (R. T. 115). Defendants' objections to hearsay statements in the Complaint and Motion to Strike Hearsay Statements in the Complaint on the ground that the Complaint was verified only by an attorney were overruled as untimely. (R.T. 140). Arguments were had on the matter and both parties rested. (R.T. 149).

On August 31, 1973, Defendants Pussycat Theatres, Inc., Vincent Miranda, Frank N. Seltzer, Walter Seltzer, George Glass, Jay Fineberg, Jack Chazan, Walnut Properties, Inc., Bette Lou Ledford, Robert Mattias, Jim Johnson, Pussycat Hollywood and Pussycat Hollywood Theatre, filed a demurrer with the Court alleging, inter alia, that each of the two causes of action of said Complaint failed to state facts sufficient to constitute a cause of action and noticed the same for a hearing on September 14, 1973. (C.T. 290-294).

On September 4, 1973, Judge David A. Thomas, speaking for the Superior Court in a minute order (C.T. 303) and informal memorandum (C.T. 298-302), denied Plaintiffs' Petition for a Preliminary Injunction. In such memorandum, Judge Thomas ruled that Harmer v. Tonylyn Productions, Inc., 23 Cal.App. 3d 941, "precludes pendente lite relief upon grounds entirely preliminary to the issue of whether the film 'Deep Throat' is obscene under Penal Code Section 311" and made no determination on that issue. (C.T. 299).

As to the first cause of action brought under Civil Code Sections 3479, 3480 and 3493 to enforce the right of a private citizen to abate a public nuisance on a showing of a special

injury to the plaintiff, Judge Thomas ruled that "In Tonylyn, the Court held that the showing of a film in a closed theater, viewed only by those patrons who paid the admission price and entered the theater, did not constitute a public nuisance;" (C.T. 300) that "while it would be constitutional for a California court to hold that an obscene film shown in a closed theater is a public nuisance, the California courts may, if they choose, hold otherwise, and the California Appellate Court, in Tonylyn clearly held, as set out above, that said showing in a closed theater does not constitute a public nuisance under California law . . . ;" (C.T. 300-301) that "The testimony of Mr. Maiorino neither established evidence in support of the allegations of special injury pleaded in the Complaint (see Complaint, Para. 23) nor otherwise established that special injury which might form the basis of maintaining this action for public nuisance . . . ;" (C.T. 301) and that "Nestle v. City of Santa Monica (1972), 6 Cal. 2d 920, had not changed the law concerning standing to sue for abatement of a public nuisance." (C.T. 301).

As to the second cause of action brought under Penal Code Section 11226, et seq., known as the Red Light Abatement Act a.k.a. Abatement of Unlawful Activities, Judge David A. Thomas

ruled that "In Tonylyn, the Court construed Penal Code Section 11225 to exclude . . ." "depictions in closed theaters of (lewd shows and exhibitions) by still or motion picture . . ." (C.T. 301) and that "Tonylyn declares that the Red Light Abatement Act does not include the exhibition of a motion picture, even if it is obscene."[5/] (C.T. 301) Judge Thomas stated that "The Court also has read the Memorandum of Decision of Judge Bruno in People v. Pussycat Theater, Superior Court of Santa Clara County #290747, and while it expresses admiration for Judge Bruno and much of what he says in said Memorandum, it cannot agree with his statement that "The statement in Harmer v. Tonylyn Products (sic) Inc., (cites omitted) that the law cannot apply to films must be held to be an inadvertent or inappropriate statement . . .;" (C.T. 302) that "Although this Court has an intellectual problem with Tonylyn, it cannot disregard or refuse to follow Tonylyn, "citing Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450 (C.T. 302). A copy of Judge Bruno's Memorandum of Decision in People v. Pussycat Theater, supra, applying the Red Light Abatement Act to a theater which was showing

5/ The Petition herein does not challenge the trial court's ruling on the second cause of action under Penal Code Section 11226 et seq.

"Deep Throat" is attached as Appendix F to Appellants' Opening Brief.

On September 14, 1973, the demurrer of Defendants Pussycat Theatres, Inc., Vincent Miranda, Frank N. Seltzer, Walter Seltzer, George Glass, Jay Fineberg, Jack Chazan, Walnut Properties, Inc., Bette Lou Ledford, Robert Mattias, Jim Johnson, Pussycat Hollywood and Pussycat Hollywood Theatre came on for a hearing in Department 85 of the Los Angeles Superior Court before the Honorable David A. Thomas. Arguments were had thereon and the matter as to whether Plaintiffs had stated a cause of action to abate a public nuisance upon a showing of "special injury" under Civil Code Sections 3479, 3480 and 3493 and whether a cause of action had been stated under Penal Code Section 11225 were taken under submission.

On September 21, 1973, by order (C.T. 306) and informal memorandum Judge David A. Thomas sustained the demurrer to the Complaint and ruled as follows: "The Complaint clearly attempts to allege a public nuisance under Civil Code Section 3480 and violation of the 'Red Light Abatement Act' (P.C. Section 11225), and clearly cannot state a cause of action on those theories." (C.T. 304).

On September 20, 1973, Appellants filed a notice of appeal from the aforementioned ruling

and a notice to prepare the Clerk's transcript. A petition for writ of mandate entitled, John Harmer, Raymond P. Gauer, Salvatore Maiorino v. Superior Court of the State of California for the County of Los Angeles, 2 Civ 43047, was filed with the Court of Appeal, Second Appellate District, on October 12, 1973, and was denied by that Court (Division Four) without opinion on October 18, 1973. A petition for hearing was denied by the California Supreme Court on November 21, 1973, with Justices Burke and Clark dissenting.[6/]

On December 17, 1973, Petitioner Maiorino herein filed an original petition for writ of mandate in the California Supreme Court, entitled, Maiorino v. Superior Court, L.A. No. 30231 and, on the same date, that Court transferred such matter to the Court of Appeal, Second District. On January 4, 1974, Division Four of the Court of Appeal denied said petition in Maiorino v. Superior Court, 2 Civ 43423.[6/] On January 22, 1974, Petitioner Maiorino filed a second original petition for writ of mandate in the California Supreme Court, entitled Maiorino v. Superior Court, L.A. No. 30244, and

6/ A certified copy of the records in 2d Civ 43047, 43423, and 43612 is being lodged with the Clerk of this Court, concurrently with this Petition.

on the same date, that Court transferred the second original petition to the Court of Appeal, Second District. On January 29, 1974, the Court of Appeal denied said second petition in Maiorino v. Superior Court, 2 Civ 43612.[6/] A petition for hearing on the denial of said second original petition, entitled Third Petition for Original Writ of Mandate and/or, Alternately, Petition for Hearing on Second Petition by Court of Appeal, Second District, was filed on February 8, 1974, and was denied by the California Supreme Court on February 27, 1974, with Justices Burke and Clark dissenting.[6/]

Petitioners herein filed a Notice of Appeal and Notice to Prepare the Clerk's Transcript on September 28, 1973, and the Record on Appeal was filed on March 21, 1974. Appellants' Opening Brief was filed on April 22, 1974, and Respondents' Brief was filed on or about September 10, 1974.

On December 27, 1974, the Court of Appeal, Second District, Division 3, filed its decision in Joseph Busch et al. v. Projection Room Theatre et al., 44 Cal.App. 3d 111, 118 Cal.Rptr. 428, holding, contrary to the law stated in Harmer et al. v. Tonylyn Productions, Inc., supra, that the continuous exhibition in a theater of obscene motion pictures can constitute a public nuisance

as an activity which is "indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property" and which "affects at the same time an entire community or neighborhood, or any considerable number of persons . . . .".

On February 3, 1975, Division 1 ordered this appeal on calendar for oral argument and the same were held on February 25, 1975.

On March 27, 1975, Division 1 filed its opinion affirming the trial court's orders, which had sustained the general demurrer to the second cause of action of Plaintiffs Harmer, Gauer and Maiorino (based upon the Red Light Abatement Law) and to the first cause of action of Plaintiffs Harmer and Gauer (based upon the right of a private citizen to enjoin and abate a public nuisance under Civil Code sections 3480 and 3493) and had denied Plaintiffs' motion for a preliminary injunction under both causes of action, including Maiorino's motion for a preliminary injunction under his first cause of action on the singular ground that Maiorino's first cause of action failed to state a claim as to which a preliminary injunction could be granted.

On May 5, 1975, petitioners herein filed a Petition for Hearing in the California Supreme

Court and on May 22, 1975 that Court granted a hearing in such matter.

On June 1, 1976, the California Supreme Court filed its opinions in People ex rel. Busch et al. v. Projection Room Theater et al., 17 Cal. 3d 42, 130 Cal.Rptr. 328 (June 1, 1976) and such decision became final on or about August 1, 1976. On August 12, 1976, that Court retransferred this appeal back to the Court of Appeal, Second District, Division One for reconsideration in light of Busch, supra.

On October 8, 1976, petitioners were informed by telephone by the Clerk of the Court of Appeal (Division One) that a supplementary brief would be received by the Court, and that such was to be filed on or before October 25, 1976. On October 25, 1976, petitioners filed and served Appellants' Supplementary Brief.

On November 23, 1976, the Court of Appeal (Division One) heard reargument, and on December 10 filed its opinion affirming the orders of the Trial Court. A copy of said opinion is attached to this Petition at Appendix "B".

On December 20, 1976, petitioners filed a Petition for Rehearing in the Court of Appeal. In the Petition for Rehearing at Page 3, petitioners asked the Court of Appeals to take judicial notice of (1) Page 65 of the Calendar Section

of the Los Angeles Times newspaper containing the adult movie advertisement for Sunday, December 19, 1976, containing the Pussycat Theatre's advertisement for "Deep Throat" and broadcasting that it is "Now in its 5th year" and is expanding its operations to the San Fernando Valley and Riverside; (2) Page 54 of the Los Angeles Times Calendar section containing a news report on the "Decline and Stabilization of the Adult Film", the full swing to hard-core, and statements of the "surefire" formula for what will work today", attributed to Appellee Miranda and (3) the fact that neither the District Attorney of Los Angeles County nor the City Attorney of the City of Los Angeles have made any effort to challenge those public nuisances in the Courtroom; and to grant a rehearing on the questions presented in the appeal.

On January 4, 1977 the petition for rehearing was denied.

ARGUMENT

POINT I

THE FAILURE OF THE STATE OF CALIFORNIA TO PROVIDE A PROMPT JUDICIAL FORUM IN WHICH TO RESOLVE THE "HARD-CORE PORNOGRAPHY VS. FREE SPEECH" ISSUE RE THE FILM "DEEP THROAT" RAISES A SUBSTANTIAL FEDERAL QUESTION.

In the 18 terms of Court since Roth-Alberts, 354 U.S. 476, 1 L. Ed.2d 1498, 77 S.Ct. 1304 (1957), was decided in June of 1957, the dockets and decisions of this Court have chronicled a major governmental struggle over the public morals of this nation (as they relate to human sexuality), between the constitutional powers of the government as a whole (State) and the people, embodied in the Tenth Amendment (Police Power), and the countervailing rights of the individual set forth in the First Amendment. In the pattern which has evolved from those decisions, this Court has fashioned a procedural requirement to maintain the balance. As recently as the 1974 October Term, Justice Blackmun, writing the majority opinion for five justices, in Southeastern Productions Ltd. v. Conrad, 420 U.S. 546, 43

L.Ed.2d 448, 95 S.Ct.1239 (March 18, 1975) ruled that minimal procedural safeguards had not been provided to the individual, in a case where government (the City of Chattanooga) sought to deny the use of a municipal auditorium for presentation of the theatrical production "Hair". See also: Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965); United States v. Thirty-Seven Photographs, 402 U.S. 363, 28 L.Ed.2d 822, 91 S.Ct. 1400 (1971); Blount v. Rizzi, 400 U.S. 410, 27 L.Ed.2d 498, 91 S.Ct. 423 (1971); Teitel Film Corp. v. Cusack, 390 U.S. 139, 19 L.Ed.2d 966, 88 S.Ct. 754 (1968). The central theme in all of these decisions has been, as stated by Justice Blackmun in Southeastern Productions Ltd., supra, at page 460, that:

> "a prompt final judicial determination must be assured".

The petition herein asserts that procedural requirement as a federal right - the right to an immediate hearing and determination.7/ Where

7/ Petitioners claim a civil right as individuals to live in an environment which is free from the corrupting influences of hard-core pornography. The judicial system in California, by its refusal to provide a prompt forum for the issues herein presented, has effectively imposed a "prior restraint" on the Community's right to "speak out" in this regard, and the right of individual members close enough to the public nuisance to be affected, to "speak out" when the Community's law enforcement officials fail and neglect to do so. See the opinion of the Montana Supreme Court in U.S. Manufacturing and Distributing Corp. v. City of Great Falls, 546 P. 2d 522 at p. 526 (February 25, 1976), which suggests that a local community has an inherent right to halt the type of conduct specifically pleaded in the Complaint below. Is the right to an immediate hearing a one-way street? Is the right of an individual to speak out against hard-core pornography of a lesser order than the right to speak out for it (by exhibiting the same)?

such federal procedural safeguards do not exist by statute, the State Court is required to fashion the same through judicial construction and interpretation. See People ex rel. Busch etc., et al. v. Projection Room Theater, et al., 17 Cal. 3d 42, 130 Cal.Rptr. 328 at 338.

Petitioners contend that the action of the Trial Court sustaining the demurrer and precluding immediate relief on petitioners' application for extraordinary relief and a prompt judicial forum to determine the "Hard-core pornography vs. Free Speech" issue re the film "Deep Throat" raises a substantial federal question in that the evidence which the petitioners offered in support of their motion, and which was uncontroverted, showed: (1) that under Near, supra, properly interpreted, "free speech" was not a relevant issue, and (2) the existence of a nuisance per

se. Reasonable minds would not differ and all would hold that such evidence showed the film "Deep Throat" to be "obscene per se" and a public nuisance as a matter of law.

A. The Film "Deep Throat" Is Obscene As A Matter Of Law.

In the Complaint on file below, Appellants have pleaded factual obscenity specially, and by attaching an accurate time and motion study and continuity of the film "Deep Throat" to the Complaint as exhibits and making the same a part thereof by reference. See Exhibits "A" and "B" to the Complaint and Exhibit "1" on the Motion for Preliminary Injunction. See also the explicit sexual conduct alleged in the complaint at pp. 13-17 (C.T. 13-17). Such matters were pleaded specially so that an issue of law as to the sufficiency of the accusatory pleading might be placed before the trial court, which could be tested by the Defendants' demurrer. Ratner v. Municipal Court of Los Angeles Judicial District, County of Los Angeles, 256 Cal.App. 2d 925, 64 Cal.Rptr. 500, 502, 503 (Dec. 14, 1967). The time and motion study which is incorporated into the Complaint by reference and was admitted into evidence as Exhibit "1" consists of a chronological series

of photographs timed in their relative order of appearance, depicting fairly and accurately the sexual conduct visually portrayed on the motion picture screen by such film. The "Continuity" which is incorporated into the Complaint is an accurate reproduction of the sound portion of the subject film, identifying the actors, their roles and what they say as the film progresses. Visual screen depictions are recorded by still camera photographs reproducted at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of time.

Plaintiffs' Exhibits 1 and 2, filed with the trial court on August 28, 1973, and admitted in evidence in the hearing on Plaintiffs' Motion for a Preliminary Injunction (R.T. at pp. 50-66 and 113-145) establish the film "Deep Throat" to be a film which is obscene per se. Reasonable minds would not differ and could come to but one conclusion, i.e., that the film was hard-core pornography. See also: N.Y. v. Mature Enterprises, Inc., 343 N.Y.S. 2d 911 (Mar. 1, 1973) affd 352 N.Y.S. 2d 346 (Jan. 14, 1974), affd as modified N.Y. v. Mature Enterprises, Inc., 35 N.Y.S. 2d 520, 323 N.E.2d 704 (Dec. 20, 1974); Whiting v.

Roxy Ltd., Inc., 293 N.E.2d 889, 891 (Mar. 12, 1973); Coleman v. Wilson, 302 A.2d 555, 561 (Mar. 21, 1974); U.S. v. One Reel of Film, 360 F.Supp. 1067 (May 15, 1973) affd in U.S. v. One Reel of Film, Gerard Damiano Productions, Inc., 481 F.2d 206 (July 16, 1973); Florida v. Aiuppa, 298 So.2d 391, (May 1, 1974); Herman v. Arkansas, 512 S.W. 2d 923 (July 1, 1974); Mangum v. Md. State Bd. of Censors, 328 A.2d 283 (Nov. 25, 1974) affd in Mangum v. States Atty. for Balt. City, 341 A.2d 786 (July 8, 1973); State of Michigan ex rel. Cahalan, 229 N.W.2d 389 (Mar. 4, 1975); Nebraska v. American Theater Corp., 230 N.W.2d 209 (June 5, 1975); McKenzie v. Butler, 398 F.Supp. 1319 (July 24, 1975); Ex parte Houston v. Hennessey, Jr., 534 S.W.2d 52 (Nov. 10, 1975); Smith v. Texas, 530 S.W.2d 955 (Jan. 7, 1976); Smith v. U.S., (C.A. 8 unreported) Petition for Writ of Certiorari filed on April 10, 1975 and granted by U.S. Supreme Court on June 21, 1976 in Smith v. U.S., No. 75-708, ___U.S.___, 51 L.Ed.2d 260 97 S.Ct.___ (Mar. 11, 1977); Colorado v. Talron, 544 P.2d 372 (Jan. 5, 1976); Menefee v. City and County of Denver, 544 P.2d 382 (Jan. 5, 1976); and Illinois v. Thomas, 346 N.E.2d 190 (Apr. 7, 1976).

When such specially pleaded matters are compared with the time-motion study of the 26-minute silent motion picture film, "Un Chant

d'Amour" prepared by Petitioners' counsel and adjudged obscene as a matter of law in Landau v. Fording, 245 Cal.App. 2d 820, 54 Cal.Rptr. 177 (Oct. 24, 1966), hearing denied by the California Supreme Court and affirmed on the merits by the United States Supreme Court, after this Court granted review on a petition for a writ of certiorari in Landau v. Fording, 388 U.S. 456, 18 L.Ed. 2d 1319, 87 S.Ct. 2109 (June 12, 1967), rehearing denied 389 U.S. 889, 19 L.Ed. 2d 199, 88 S.Ct. 16 (Oct. 9, 1967), it is difficult to understand how such a state of public indecency can come into existence. A copy of the time-motion study of "Un Chant d'Amour" appearing at Appendix "A" of the Plaintiffs' Points and Authorities, filed in the trial court was prepared by counsel for Petitioners, who represents to this Court that the same is an exact reproduction of the content appearing in the 16mm. film, "Un Chant d'Amour", which was an exhibit before the United States Supreme Court in 388 U.S. 456, where counsel for plaintiffs viewed the same.

B. Under The Facts Pleaded In Their Complaint, Petitioners Have Demonstrated A Clear Right To Extraordinary Relief. The Hearing On The Application For A Preliminary Injunction Should Have Gone Forward As Noticed And Immediate Relief Should Have Been Granted.

The preliminary injunction issue, involving the film "Deep Throat" was before the Georgia Supreme Court in S.S.W. Corp. et al. v. Slaton, 204 S.E.2d 155 (Feb. 18, 1974). There, the Georgia Supreme Court held at p. 158:

"We acknowledge that interlocutory judicial restraint with respect to a First Amendment claim must be reasonable and should be followed as promptly as is practicable by a final judicial determination of First Amendment issues. We tried to say this as plainly as we knew how in this court's order of October 1, 1973, denying the motion for supersedeas in this case (see appendix.)

"But for this court to hold that a film, judicially determined to be obscene at a preliminary hearing, cannot be suppressed during the pendency of the litigation as to whether it is obscene or not

would effectively deny the state the right to suppress the showing of an obscene film. This is so because without the possibility of interlocutory prohibition, a film, ultimately adjudged to be obscene, could be shown during the many months and years of trial and appellate litigation permitted by our system before a judgment is absolutely final.

"Obscenity is not protected by the First Amendment, and after a preliminary judicial determination that material is obscene, such material is not protected during the course of the litigation on its way to a final judgment. In short, we hold that interlocutory judicial restraint of obscene material, with adequate provision being made that First Amendment claims can proceed to final judgment at the earliest practicable date, is not violative of First Amendment rights."

C. A State May Not Deny Access To The State Judicial System To Citizens Who Seek To Prevent The Exhibition Of Hard-Core Pornography In Their Local Community.

1. The State of California may not deny access to its Courts or refuse to entertain civil actions which are designed to prevent the dissemination of subject matter which the United States of America, by treaty, is required to discourage.

In Roth v. U.S., 354 U.S. 476 at 484 (June 21, 1957) this Court took notice of an existing international policy agreement:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, 8/ ..."

8/ A copy of the 1911 "Agreement for the Suppression of the Circulation of Obscene Publications", 37 Stat 1511-1515, referred to by the Roth Court at footnote 15 is attached as Exhibit "J" to this Petition. In that treaty, the United States of America, as a signatory nation, expressed the national desire to repress "offenses connected with obscene publications" and entered into a mutual compact with other nations to that end.

In Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed. 628 (1879), this Court noted that the treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. When the conflict is between the provision of a treaty and a provision of a state statute the treaty supercedes prior conflicting state legislation, and cannot be restricted by later inconsistent state statutes. Sutherland Statutory Construction, Vol 1A, Section 23.22. "Conflict between statutes and treaties" at page 262.

A treaty cannot be the Supreme law of the land, that is of all of the United States, if an act of a State Legislature can stand in its way. Ware v. Hylton, 3 Dall. 199 (1746).

2. A state public policy which would permit the dissemination of hard-core pornography would be invalid under the "one people" concept regarding the federal police power.

The "one people" concept of federalism, (see Hoke v. U.S., 27 U.S. 308 (Feb. 24, 1913), envisions the federal government as having been granted plenary power and charged with the concomitant duty and responsibility of administering those controls, which have been established by their representatives at the national level, in a way which will safeguard the standards of public decency (morality) which are common to the individual State members of the compact. Under the "one people" concept the federal government has total control over subject matter as to which reasonable minds would not differ and all would hold to be pornographic (hard-core pornography).

Petitioners dispute with the ruling of the Court of Appeal below[9/] is its refusal to consider the inescapable consequences flowing from the "one motion" concept which has been developed in aid of maintaining good public morality.

9/ See Petition for Rehearing at pages 2-4. Cf. the trial court's ruling that, were Maiorino to attempt to amend:

> "on amendment, the alleged obscenity of the picture 'Deep Throat' will not form the basis for Plaintiff Maiorino's Allegations of private nuisance". (R.T. 305, also appendix herein at pp. A- 11

See Part XIV entitled "The 'One People' Concept," 10/ appearing in "The Challenge of a Modern Federal Criminal Code Statement in the U.S. Senate by Senator John L. McClellan, March 11, 1971, in Hearings Before the

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10/ XIV. THE "ONE PEOPLE" CONCEPT. Between the Code of 1909 and the codification of 1948, a number of significant new Federal criminal offenses were enacted. Their significance can be best understood, however, by prefacing their consideration by a reference to Madison's conception of the scope of the powers of the Federal Government. In the Federalist No. 44, he observed:

> The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.

This limited conception of the role of the Federal Government stands in sharp contrast, of course, with what as a matter of history has come to pass. For example, in June, 1910, less than 6 months after the Code of 1909 went into effect, Congress passed the Mann Act, a provision against the "moral misuse" of the facilities of interstate commerce. (Act of June 25, 1910, c. 395, 36 Stat. 825.) In Hoke v. United States, 277 U.S. 308, 322 (1913), upholding the act, Mr. Justice McKenna employed expressions which, when considered, serve as a reminder that,

Subcommittee on Criminal Law and Procedures of the Committee on the Judiciary, United States Senate, Ninety-second Congress, First Session, Part 1," at p. 30. In Congress, the

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since 1872, Congress had been acting, intermittently, upon a principle foreign to Madison's that did not come into application until after the Civil War. He said:

"Our dual form of government has its perplexities . . . but it must be kept in mind that we are one people . . . and the powers (granted to the Federal government) . . . are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."

The inference is plain. Lotteries, frauds, circulation of obscene literature, prostitution, narcotic addiction, all were, at first, well within what Madison had in mind when he commented that the powers reserved to the States extended to "all objects which, in the ordinary course of affairs, concern . . . the internal order, improvement, and prosperity of the state." The trouble was that it proved, as we became not only one people, but one nation, impossible for the States, under their own powers, effectually to preserve "internal order" in these matters when the facilities of the mails were seen to operate, in one fashion, and the privileges of interstate commerce, in another, to negate the efforts of any state to suppress what the people of the nation saw as national evils. In the judgment of many, these evils were pervasive throughout the whole nation. There were, moreover, Federal constitutional powers under which they could be attacked by the enactment of federal criminal legislation. From time to time, therefore, Congress made use of the powers assigned to the general government, singly or in combination, "to promote the general welfare, material and moral."

several states have assembled and established a comprehensive set of federal controls of obscenity over (1) importation from abroad, (2) use of the mails, (3) transportation in interstate commerce, and (4) international movement. In view of such federal legislation, obscenity (hard-core pornography) is not simply a matter of state interest. It is, under the "one people" concept, a matter of state and federal interest. Independent federal interest have been "identified" by this Court in the well-documented views of Justice Harlan. See, for example, Roth v. U.S., 354 U.S. at 497-498. Petitioners submit that the foundation for Harlan's views are to be found in the "one people" concept. In granting such powers to the Federal government, it was the expectation of the compact States that the Federal government would administer those powers to suppress that subject matter which was considered by the States as a whole to be injurious to public morals, as declared by their representatives in federal legislation. See Champion v. Ames, 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492 (1903), where the court said at pp. 356 and 357:

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution . . . . But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals . . . As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people

of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end . . . ." (Our emphasis.)

In enumerating his hard-core pornography rule limitation on federal power, Harlan was using as a common denominator that "bottom of the barrel" quality of material as to which it

might be said that reasonable minds would not differ, and could come to but one conclusion.[11/]

In Miller v. California et al., supra, this Court's obscenity decisions took a sharp turn in course from the direction in which they had been proceeding. Over night, all of the hurdles which had been constructed against law enforcement were removed and the pornographers awoke on June 21, 1973, to find themselves stripped of their defenses. In spite of the braking action which this Court has applied, the expected positive gains have not been achieved. Nor will they, until the conspicuous contradiction in those decisions is corrected.[12/]

11/ Conceptually speaking, obscenity might be visualized as a polluted liquid of varying densities contained within a barrel, with hard-core pornography, with the heaviest density, lying at the bottom of the barrel. Protected free speech can be visualized as that clear liquid which overflows and lies outside the barrel. That subject matter which lies inside the barrel and on top of the density layer which is "hard-core pornography" is non-protected subject matter, which states may legalize or proscribe in their discretion.

12/ This Court said in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, June 21, 1973:

> "The States, of course, may follow such a 'laissez faire' policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the place, but nothing in the Constitution compels the States to do so with regard to matters falling within state jurisdiction. . . ."

Surely this Court was not saying that hard-core pornography, which under federal law may not be imported; may not be placed in the mail, may have no property value, may not be copyrighted and which may not be sent interstate, can nevertheless be given a legal status and value within a state? What of the expression in Roth-Alberts, 354 U.S. 476, 485, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) that it is the universal judgment of civilized nations as reflected in their international agreements, that obscenity should be restrained? Should not this Court explain that statement by recognizing the Harlan view expressed in Roth v. U.S., 354 U.S. 476, at 500, and admitting that what the court was talking about, in so far as States are concerned, was something which was specifically described, but less than hard-core pornography (reasonable men would not differ and could come to but one conclusion), and yet not quite protected speech.

3. On the question of whether hard-core pornography is to be tolerated, federal law has occupied the field.

When Congress exercises a granted power, the federal legislation may displace state law under the Supremacy Clause. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23 (1824). Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-230, 11

L.Ed. 1447, 67 S.Ct. 1146, 1151, 1152 (1947).

(a) The disposition of "hard-core pornography" inherently, is a matter for federal control:

In Congress assembled, the representatives of the several states have established a comprehensive set of federal controls on obscenity over (1) importation from abroad, (2) use of the mails, and (3) transportation in interstate commerce. See 18 U.S.C. Sections 1461-1465, 1735, 1737; 19 U.S.C. Section 1305. Those controls have been supplemented by treaty abroad. In a situation such as this, where the evidence clearly points to a total restraint on such hard-core pornography, the federal compact must prevail and federal preemption is clearly operative. While Congress has never established a definition of obscenity, it has not, as noted above, been silent about whether or not obscenity should be proscribed, cf. Justice Harlan's discussion of the category of obscenity, "hard-core pornography", and federal power in relation thereto, cited with approval in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 431, 93 S.Ct. 2607. As regards the category "hard-core pornography", see Justice Douglas speaking on pre-

emption in Campbell v. Hussey, 368 U.S. 297, 7 L.Ed.2d 299, 82 S.Ct. 327 at 301:

"We do not have here the question whether Georgia's law conflicts with the federal law. Rather we have the question of pre-emption. Under the federal law there can be but one 'official' standard - one that is 'uniform' and that eliminates all confusion by classifying tobacco not by geographical origin but by its characteristics. In other words, our view is that Congress, in legislating concerning the types of tobacco sold at auction, pre-empted the field and left no room for any supplementary state regulation concerning those same types."

(b) The Congressional intent has been clearly stated that obscenity shall not be given a free reign.

In its Act of Oct. 3, 1967, Public Law 90-100 81 Stat. 253 (creating the Commission on Obscenity and Pornography) Congress specifically held that the traffic in obscenity and pornography is a matter of national concern. See Section 1 of Public Law 90-100 which provided:

"Section 1. Finding of fact and declaration of policy. - The Congress finds that the traffic in obscenity and pornography is a matter of national concern. The problem, however, is not one which can be solved at any one level of government. The Federal Government has a responsibility to investigate the gravity of this situation and to determine whether such materials are harmful to the public, and particularly to minors, and whether more effective methods should be devised to control the transmission of such materials. The State and local governments have an equal responsibility in the exercise of their regulatory powers and any attempts to control this transmission should be a coordinated effort at the various governmental levels. It is the purpose of this Act (this note) to establish an advisory commission whose purpose shall be, after a thorough study which shall include a study of the causal relationship of such materials to antisocial behavior, to recommend advisable, appropriate, effective, and constitutional means to deal effectively with such traffic in obscenity and pornography."

See also, Senate Resolution No. 477, rejecting the findings and recommendations of the Commission on Obscenity and Pornography, which recommended the liberation of obscenity. (Congressional Record for October 13, 1970 at pages 36474-36478.)

Petitioners submit that this court has not indicated, with regard to competing interests, that it has recognized that the regulation of "obscenity" is predominantly a matter of state, not federal interest. In Paris Adult Theatre, this court was addressing itself to the opposing interests of the Tenth Amendment to the Federal Constitution (which reserves to states the power to regulate obscenity) and the First Amendment (freedom of speech which traditionally resists such regulation.) Any argument that this Court in Paris Adult Theater has rejected any need for national uniformity does not place this Court's remarks in their proper context. The solution therein arrived at was in response to the problem of how to find an accomodation between the opposing interests of the Tenth Amendment (state police power) and the First Amendment (free speech). That accommodation does not dispute or deny the national need to provide controls which aid in the individual state efforts to supprress obscenity.

POINT II

THE DENIAL OF A PROMPT JUDICIAL FORUM IN WHICH TO CONTEST RESPONDENTS' RIGHT TO COMMERCIALLY EXHIBIT THE HARD-CORE FILM WHICH IS SPECIALLY PLEADED IN THE COMPLAINT HEREIN, HAS DEPRIVED PETITIONERS OF FUNDAMENTAL RIGHTS UNDER THE FEDERAL CONSTITUTION.

Petitioners as citizens of the U.S. have a federally protected right to live in a community whose public morals, moral values, and environment are free from the degrading and corrupting influences of the patently hard-core pornography which is specially pleaded in the Complaint. The refusal, in 1973 to provide a prompt judicial forum and grant the immediate relief herein requested has deprived petitioners as citizens of the United States of:

(1) due process of law and equal protection of the law;

(2) the police power which is inherent in municipal authority; and

(3) one of the fundamental rights essential to the concept of well-ordered liberty; namely, the right to enjoy "common"

decency" and to live in a community whose public morals, moral values and environment are free from the illegal, degrading and corrupting influences of such patently hard-core pornography.

A. Where Commercial Vice Is Involved, The Power To Abate The Same Is Inherent, And Plenary, And May Not Be Interfered With.

"The power to determine the question of what will injuriously affect the public is lodged with the legislative branch of the Government." Mugler v. Kansas, 123 U.S. 205 at 210 (Dec. 5, 1887).

A legislative act or judicial ruling which would restrict a municipality's police power to legislate on those matters considered necessary to safeguard public morality would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210, 211. See also Stone v. Mississippi, 101 U.S. 816, where the United States Supreme Court noted:

"no legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less

their servants . . . government is organized with a view to their preservation, and cannot divest itself of the power to provide for them."

The power to abate a Public Nuisance is one of the most basic powers of local government - the power possessed by municipal government in aid of its duty to protect the public morals of the local community against that type of public conduct which is regarded as being malum in se. In addressing himself to the public morals issue and the pre-eminent power of local government to control the same, Woods describes the danger as being in the nature of a "nuisance per se." See "The Law of Nuisances" by H.G. Wood, Sections 23 and 24, at pp. 45-46:

"Section 23. Acts affecting public morals, public nuisances per se, when. - There are classes or kinds of businesses which are nuisances per se, and the very fact that they are carried on in a public place is prima facie sufficient to establish the offense. But in such cases, if the respondent questions that the use of his property in the manner charged in the indictment produces the effects set forth therein, and introduces evidence to sustain his position,

it then becomes necessary to prove that the effects are such as are charged. But there are a class of nuisances arising from the use of real property and from one's personal conduct that are nuisances per se, irrespective of their results and location, and the existence of which only need to be proved in any locality, whether near to or far removed from cities, towns, or human habitations, to bring them within the purview of public nuisances. This latter class are those intangible injuries which affect the morality of mankind, and are in derogation of public morals and public decency."

"Section 24. Wrongs malum in se. - This class of nuisances are of that aggravated class of wrongs that, being malum in se, the courts need no proof of their bad results and require none. The experience of all mankind condemns any occupation that tampers with the public morals, tends to idleness and the promotion of evil manners, and anything that produces that result finds no encouragement from the law, but is universally regarded and condemned by it as a public nuisance." (Our emphasis.)

That municipal power is inherent in government itself and is so basic that its grant of authority is said to be "implied", and to flow from the Common Law and basic civil rights inherent in individuals, rather than from "express" provisions in the City's Charter or the General Laws of the State. See "The Law of Nuisances," Woods, Section 743, at p. 972:

> "Section 743. No control over nuisances without special power. - Therefore, a municipal corporation has no control over nuisances existing within its corporate limits except such as is conferred upon it by its charter or by general law. <u>There can be no question, however, but that where a nuisance exists within its corporate limits that is clearly a nuisance at common law</u> or by statute, which is detrimental to the health of the inhabitants, <u>it may be abated by the authorities, but it must be a nuisance at common law</u> and one which any person injured thereby might lawfully abate of his own motion, or in the absence of express or implied authority given, the removal or abatement of the nuisance would be unlawful. Where the thing abated is clearly a nuisance, and one which affects the <u>health</u> of the city,

> the abatement may be made by the authorities or by any person injured thereby. <u>The common law in such a case comes in aid of the authorities, and they are justified in the act, not because they are officials of the city, but because they are citizens injured by the thing abated.</u>" (Our emphasis.)

See also, Section 3495 of the California Civil Code, at Appendix "F" infra. Joyce, in his treatise "Law of Nuisance", Section 345, notes that this common law power entrusts the municipal corporation with not only the right but the <u>obligation</u> to remove the nuisance; at p. 498:

> "The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it. And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by

the charter or violates the constitution."

The importance of this abatement power was stressed by the United States Supreme Court in James Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850):

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. . ."
>
> "It is a principle of the common law, that the king cannot sanction a nuisance. . ."

B. The California Judiciary Have A Moral Responsibility As The Guardian Of The Peoples' Morals.

It was long ago decided that the Courts in our Anglo-Saxon legal system are the guardian of the public morals. Rex v. Curl, 2 Strange 789 (1727), Sir Charles Sedley's Case, 1 SID 168. Where the legislature had bargained away that power, the California Court in Farmer v. Behmer, 100 P. 901 at 904 had the following to say:

> "It is a novel doctrine that the Legislature may empower a city by its charter to suspend the operation of general laws punishing crime. No one would for a

> moment contend that murder, manslaughter, larceny, burglary, or any other of the long list of crimes punishable by statute could be condoned or palliated by an ordinance regulating or licensing such offenses. The heinousness or degree of the crime can make no difference. The statute punishing the keeping of a house of prostitution as a crime can no more be suspended in its operation than any other criminal statute . . . ."

Since the legislatures are subject to censure by the California Courts for failing in their responsibility to safeguard the public morals, then the Courts should also be expected to reciprocate and exercise those powers and perform those duties which are required of the Court under the common law in similar circumstances. See Stone v. Mississippi, supra.

C. Respondents Should Be Held Responsible To The Community For An Accounting As To Their Unjust Enrichment Arising Out Of An Unlawful Act.

The subject matter which was pleaded in the body and Exhibits "A" and "B" to the Complaint, demonstrated beyond all shadow of a doubt that the motion picture film "Deep Throat" is pornography under federal law and, as such, contraband; that the exhibition should have been terminated, and that the injunction should have been granted. Under rudimentary, equitable principles, respondents are required to account to the community for the unjust enrichment accruing by virtue of their unlawful act. People of the State of California v. Superior Court, 28 Cal.App.3d 600, 104 Cal.Rptr. 876, 882-885. See also, Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974). Appeal dismissed for want of a substantial federal question in Art Theater Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82, 95 S.Ct. 1649 (Apr. 21, 1975) where the Ohio Supreme Court held at p. 918:

> "However, the Court of Appeals did not order a forfeiture; it merely required that appellants account for and pay to the county

> treasurer the receipts obtained from showing 'Without A Stitch' after the date on which the trial court's permanent injunction would have become effective had the judge not stayed it. This accounting was not imposed as a result of any illegal act on the part of appellants; it was, instead, a recognition by the Court of Appeals that the trial court erred when it stayed the effectiveness of its injunction order. As noted in our discussion under issue No. III, a trial court is required by R.C. 3767.05 to issue a permanent injunction when it declares a film to be obscene; it does not have the power to stay the effectiveness of the injunction. The only way the Court of Appeals could rectify that error was to assure that appellants did not profit thereby — which was the object of the accounting order." (Our emphasis.)

POINT III

THE "SPECIAL INJURY" CONCEPT SERVES NO VALID PURPOSE IN THE PRESENT STRUCTURE OF THE LAW, AND SHOULD NO LONGER BE A VIABLE EXPEDIENT IN THE DISPOSITION OF PUBLIC NUISANCE ABATEMENT CASES WHERE THERE IS PRESENT A BONE FIDE ADVERSARIAL DISPUTE. CERTAINLY, IT HAS NO APPLICATION WHERE THE PLAINTIFFS' ATTACK IS BASED UPON CONSTITUTIONAL GROUNDS.

The opinion of Division Three in the "Devil in Miss Jones" case, petition for writ of certiorari filed in this Court on Harmer et al v. "Devil in Miss Jones" No. 76-1110 is irreconcilable with the opinion of Division One in the "Deep Throat" appeal herein. (See Appendix "A" and "B" herein). These inconsistent results present a due process and unequal protection of the law dilemma in the resolution of this "special injury" issue. To further complicate matters, the "Devil in Miss Jones" decision is unreported and, as such, is subject to the prohibition of Rule 977 of the California Rules of Court, which prevents that citation as precedent, a result which violates time-honored "stare decisis" principles.

Petitioners submit that the opinion of the Court of Appeal (Division 3) in Harmer et al v. A Motion Picture Film Entitled "Devil in Miss Jones" recognizes the fact that strict application of the "special injury" concept in such a case as this poses a problem and may not be in the best public interest. That Court remanded the cause to the trial court for amendment "to show special injury sufficient to justify the maintenance of a private suit to abate a public nuisance or a controversy with a potential for substantial injury to them justifying their maintenance of a declaratory relief action." (See Appendix "B" at pp. 15-16.) On the other hand, Division 1, herein, in Harmer et al v. A Motion Picture Film Entitled "Deep Throat" et al., supra, avoided that approach and, giving lip service to the problem, suggested that if the "special injury" requirement were to be recognized as having been met, that it was a matter for the California Supreme Court to consider. (See Appendix "A" at pp. 28-29.) Faced with this "special injury" standing requirement and dilemma in public nuisance abatement cases brought by private citizens, the California Supreme Court did nothing!

In Save Sand Key, Inc. v. U. S. Steel Corp., 281 So.2d 572 at 574, the District Court of Appeal of Florida, Second District, in addressing itself to the "special injury" standing requirement in public nuisance abatement cases brought by private citizens stated:

> "(I)t is anathema to any system of justice to proclaim that a right may be enjoyed by all yet none may protect it. Accordingly, except in strictly nuisance cases to date, the obvious recent trend is to open the courts to afford relief to many more parties plaintiff than were heretofore entitled thereto under the 'special injury' rule so broadly applied."

In striking that requirement from the law of public nuisance, the Court took note of the end result which, more often than not, flowed from an adherence to that rule of law:

> "(A)ll too often we observe the aforesaid duty to abate nuisances rested overly long in the bosom of the appointed officials and relief was indeed ultimately never attained by the public or anyone else."

While the District Court of Appeal decision, above referred to, was subsequently reversed by the Florida Supreme Court by a 4-3 vote in U.S. Steel Corp. v. Save Sand Key Inc., 303 So.2d 9

(June 12, 1974), the analysis of those justices who voted for abandoning that test bears recognition, for it points up the injustices which are being perpetuated by a rigid interpretation of the "special injury" requirement.[13/]

While the majority of the Florida Supreme Court did not uphold the decision of the lower Florida appellate court which struck the "special injury" requirement from the law, that Court did reaffirm an exception previously adopted in Department of Administration v. Horne, 269 So.2d 659 (1972), "limited to constitutional challenges on taxing and spending as earlier indicated." In that case, the Florida Supreme Court stated:

> "Appellees have alleged the unconstitutionality of certain sections of an appropriations act. These sections are said to be violative of constitutional provisions which place limitations upon enacting legislation regarding state funds. We hold that such allegation in this narrow area

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13/ In his dissent at p. 14, Justice Ervin of the Florida Supreme Court recommends for reading the case comment in University of Florida Law Review Vol. XXVI No. 2, Winter 1974, p. 360 which analyzes the Sand Key, Inc., case, and at p. 365 reports on the final disposition in such cases where there is no one left to enforce the public right.

satisfied the requirement for 'standing' to attack an appropriations act."

The decision of the Florida Supreme Court in Horne, supra, was based upon the rationale expressed by this Court in Flast v. Cohen, 392 U. S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (June 10, 1968). Flast presented the first evidence of a reevaluation of the special injury rule and its effect on the standing question. In that taxpayer suit challenging federal spending, the Court recognized standing without requiring a showing of special injury. This Court indicated that standing was merely a threshhold question. determining whether the dispute sought to be adjudicated would be presented in an adversary context. With this emphasis on the adversary context, the standing criterion approached "injury-in-fact", "aesthetic, conservational, and recreational as well as economic." The Court expressly dismissed the long espoused spectre of multiplicity of actions, recognizing the ability of the courts to exercise judicial discretion in order to avert completely frivolous lawsuits.

The recent federal actions defining and expanding injury-in-fact were based on judicial interpretation of statutory authority giving "persons aggrieved" standing to challenge agency action. This concept was expanded in Sierra

Club v. Morton, 405 U.S. 727, 732 (1972), holding that where a party does not rely on statutory authorization the question of standing depends on whether the party has alleged such a personal stake in the outcome that the dispute will be presented in an adversary context.

Petitioners submit that the nature of the case -- being a conflict between alleged first and tenth amendment rights -- places the instant controversy in that category of exceptions governed by Horne which call for an acknowledgment of the "standing" rule applied in Flast v. Cohen, supra, and Sierra Club v. Morton, [14] supra, rather than the "special injury" rule formerly adhered to. The Flast and Sierra Club criteria are fully satisfied by petitioners

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14/ See University of Florida Law Review Vol. XXVI No. 2, Winter 1974, p. 360 at p. 366: "The public has demonstrated an ability to present the essential issues with sufficient clarity to insure the requisite adversary context. The instant decision recognizes the judiciary's ability to utilize modern rules of procedure and pleading to insure that the proper parties and issues are before it. By refusing to apply inflexible and outdated standards that prevent, rather than promote, an efficient administration of justice, the instant court has demonstrated Florida's expanding judicial desire to allow citizen participation in the resolution of problems that directly affect them, whether individually or in common with the community."

herein. In few areas of the law is there a greater need for citizen participation in the Courtroom in the resolution of problems than in the legal attack against the growth of pornography in the local neighborhoods.

CONCLUSION

Petitioners submit that the facts specifically pleaded in the Complaint clearly established the film "Deep Throat" to be hard-core pornography and the petitioners to be entitled to immediate relief by way of a preliminary injunction against its exhibition. By denying a prompt judicial forum in which to contest the right of the respondents to publicly exhibit the same for profit, the State of California has deprived the petitioners of their federal civil rights to enjoy "common decency" and to live in a community whose public morals are free from the corrupting influences of patently hard-core pornography.

The Writ of Certiorari should be granted as prayed for.

DATED: May 1, 1977.

Respectfully submitted,

James J. Clancy
Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this lst day of May, 1977, copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

David M. Brown, Esq.
433 North Camden
Post Office Box 4055
Beverly Hills, California 90313

JAMES J. CLANCY
Attorney for Petitioner

APPENDIX A

Trial court memorandum, dated
Sept. 4, 1973 . . . . . A-1 - A-7

Trial court minute order, dated
Sept. 4, 1973 . . . . . A-8

Trial court memorandum, dated
Sept. 21, 1973 . . . . . A-9 - A-11

Trial court minute order, dated
Sept. 21, 1973 . . . . . A-12 - A-13

Trial court order of dismissal, dated
Sept. 21, 1973 . . . . . A-14

Unreported opinion of the Court
of Appeal, Second Appellate
District, Division One, in
Harmer, et al. v. "Deep Throat"
et al., 2d Civ 43913 . . . . . A-15 - A-32

California Supreme Court notice, dated
Feb. 3, 1977, denying a petition
for hearing A-33

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN HARMER, et al., Plaintiffs, vs. A MOTION PICTURE FILM ENTITLED "DEEP THROAT", etc., et al., Defendants.	NO. C 63814 INFORMAL MEMORANDUM

The Court has denied through a minute order of this date plaintiffs' petition for a preliminary injunction against, inter alia, the continued exhibition of the film "Deep Throat". Inasmuch as the issue is important and the ground for the ruling is narrow, the Court sets out in this Informal Memorandum the bases for its ruling.

COMPLAINT

The complaint is summarized below in order that the bases for this Court's order may be understood.

The complaint contains two causes of action. The first alleges that the picture "Deep Throat" is obscene and its showing constitutes a public nuisance within California CC §3480 (Complaint,

paragraph 34). The second cause of action alleges that the showing of the moving picture "Deep Throat" constitutes a violation of Penal Code §11225 ("Red Light Abatement Act") by reason of its obscene nature. Upon the two causes of action, or either of them, the plaintiffs pray inter alia for a preliminary injunction against the continued exhibition of "Deep Throat" and for a forfeiture of the film. Although plaintiffs' complaint is long (37 pages), the above summary fairly states plaintiffs' theories.

ISSUE OF OBSCENITY

Inasmuch as the Court concludes that Harmer v. Tonylyn Productions, Inc. (1972), 23 Cal.App. 3d 941 (rehearing denied March 30, 1972; pet. for hring. by the Sup. Ct. denied April 26, 1972), (hereinafter referred to as "Tonylyn") presently precludes pendente lite relief upon grounds entirely preliminary to the issue of whether the film "Deep Throat" is obscene under Penal Code §311, this Court makes no determination of said issue, and admonishes all parties hereto to not misconstrue the present minute order as one determinative of the issue of obscenity.

APPLICABLE LAW

The preliminary injunction, if granted at all, would be effective only until trial

of this matter, and this entire ruling will be superseded by a final ruling after trial. It is not the function of this Court to finally determine the issues. Therefore, the Court measures from the pleadings and evidence only the "(p)robability ... of ultimate success....". State Board of Barber Examiners v. Star (1970), 8 Cal.App. 3d 716, 738. Further, the injunction should not lie if the case is "doubtful"; rather, the injunction will lie only if plaintiff's case is clear and injury avertible only by injunctive relief. Schwartz v. Arata (1920), 45 Cal.App. 596. This probability of success encompasses consideration of whether the complaint states a cause of action, and although here defendant has not yet filed a pleading responsive to the complaint, the Court has taken into consideration the maintainability of the action. The limited scope of the ruling made this date should be clearly understood.

DISCUSSION OF CAUSES OF ACTION

First Cause of Action (public nuisance):

Plaintiffs candidly assert at the very outset of their presentation that "This is a case of second impression in the State of California. See Harmer v. Tonylyn Productions, Inc. (citations omitted)", as indeed it is. However, plaintiffs forcefully contend that the recent U.S. Supreme Court decisions (Miller v. California (June 12, 1973) 13

CrL 3161 and companion cases of the same date) "...give voice to a powerful new policy statement of the Court that legal efforts should be directed by the states toward bringing this runaway situation (of purveyance of hardcore pornography) under control." (Pts. & Auth., page 6).

Although the Court agrees that said Supreme Court decisions have enunciated new law concerning obscenity, it concludes that said cases do not change the basis for Tonylyn (which really is not an "obscenity case" at all, but is one of statutory construction) which still is binding on this Court.

In Tonylyn, the Court held that the showing of a film in a closed theater, viewed only by those patrons who paid the admission price and entered the theater, did not constitute a public nuisance (opinion, page 943). The Supreme Court in its recent decisions, particularly in Paris Adult Theater No. I v. Slaton (June 21, 1973) 13 CrL 3171, did not change the California law in this respect. All that the Supreme Court said in Paris is that a state statute which prohibits the showing of an obscene film in a closed theater is not unconstitutional. The Court very carefully pointed out that the states need not determine that the converse is true, saying:

> "It should be clear from the outset that we do not undertake to tell the states what they must do but rather to define the area in which they may chart their own course in dealing with obscene material."

Thus, while it would be constitutional for a California court to hold that an obscene film shown in a closed theater is a public nuisance, the California courts may, if they choose, hold otherwise. And the California Appellate Court, in Tonylyn clearly held, as set out above, that said showing in a closed theater does not constitute a public nuisance under California law. The recent Supreme Court rulings do not upset Tonylyn but inform us only that we and the other states may define, if we choose, exhibitions of obscene films to be public nuisances.

The testimony of Mr. Maiorino neither established evidence in support of the allegations of special injury pleaded in the complaint (see Complaint, paragraph 23) nor otherwise established that special injury which might form the basis of maintaining this action for public nuisance. Although plaintiffs have alleged that Nestle v. City of Santa Monica (1972), 6 Cal. 3d 920, has changed the law concerning standing to sue for abatement of a public nuisance, said assertion simply is not correct, at least in the Tonylyn and instant situations.

Second Cause of Action ("Red Light Abatement"): In Tonylyn, the Court construed Penal Code §11225 to exclude "...depictions in closed theaters of (lewd shows and exhibitions) by still or motion picture...." (page 944). There is no constitutional problem involved in this portion of the Tonylyn ruling, which is limited to a construction of the statute. Thus, whatever new policy may have been expressed by the recent Supreme Court decisions concerning obscenity simply is irrelevant, for Tonylyn declares that the Red Light Abatement Act does not include the exhibition of a motion picture, even if it is obscene.

BINDING NATURE OF TONYLYN

This Court has examined the rationale for the Tonylyn ruling again, as it has examined it on earlier occasions (see its Informal Memorandum in Busch v. Sex Appeal, etc., C 56573), and has carefully reread those several Supreme Court rulings referred to above. The Court concludes that it is as bound by Tonylyn presently as it was before said Supreme Court rulings were issued. The Court also has read the MEMORANDUM OF DECISION of Judge Bruno in People v. Pussy Cat Theater, Superior Court of Santa Clara County, #290747, and while it expresses admiration for Judge Bruno and much of what he says

in said memorandum, it cannot agree with his statement that "The statement in Harmer v. Tonylyn Products (sic) Inc., (cites omitted) that the law cannot apply to films must be held to be an inadvertent or inappropriate statement....", and cites People v. Sarong Gals (1972), 27 Cal.App. 3d 46 as authority therefor. Although this Court has an intellectual problem with Tonylyn, it cannot disregard or refuse to follow Tonylyn. Auto Equity Sales, Inc. v. Superior Court (1962), 57 Cal. 2d 450, at 454-455, says:

> "Decisions of every division of the District Courts of Appeal are binding upon all...the Superior Courts of this State, and this is so whether or not the Superior Court...Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."

While in Auto Equity Sales, Inc., supra, at page 456, the Court recognizes the right of a Superior Court to choose between conflicting Courts of Appeal decisions, this Court does not consider any appellate decision, including Sarong Gals, supra, to be in conflict with Tonylyn.

DAVID A. THOMAS
Sept. 4, 1973

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. 85

Date: September 4, 1973

HONORABLE David A. Thomas JUDGE
HONORABLE JUDGE PRO TEM
Ed Harrold Deputy Sheriff

C Saunders Deputy Clerk 85
None Reporter

C 63814

John Harmer, et al.
vs.
A Motion Picture Film Entitled "Deep Throat"

NATURE OF PROCEEDINGS.

Motion for preliminary injunction and for a declaration of forfeiture	In this matter, heretofore taken under submission on August 28, 1973, the Court now makes the following ruling: The motion for preliminary injunction and for forfeiture is denied in accordance with Informal Memorandum signed and filed this date. Counsel for defendant Pussycat Theatres, Inc. to serve notice. Copy of this order and the Court's Informal Memorandum mailed to counsel by U.S. Mail this date.
September 4, 1973 (23) Dept., 85	

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

JOHN HARMER, et al., Plaintiffs, v. A MOTION PICTURE FILM ENTITLED "DEEP THROAT", etc., et al., Defendants.	NO. C 63814 INFORMAL MEMORANDUM

The Court writes this Informal Memorandum to set out the reasoning for its minute order of this date which sustains the defendants' demurrer without leave to amend as to Plaintiffs Harmer and Gauer, but gives leave to Plaintiff Maiorino to amend his complaint.

The Complaint clearly attempts to allege a public nuisance under CCC §3480 and violation of the "Red Light Abatement Act" (PC §11225), and clearly cannot state a cause of action on those theories (see this Court's Informal Memorandum of September 4, 1973). However, in plaintiffs' oral argument in response to the defendants' demurrer, plaintiffs asserted that the complaint seeks to state a cause of action for private nuisance, and not public nuisance. Of course, this argument is completely incorrect, for the entire

file and earlier proceedings leave no question but that private nuisance was never pleaded or advanced by plaintiffs (see the Complaint, plaintiffs' Memorandum of Points and Authorities, and plaintiffs' other documents in the file which indicate that at all times plaintiffs' theories have been those two first described above). Nonetheless, the Court has considered whether plaintiffs can state a cause of action for private nuisance in order to determine whether the Court should now give plaintiffs leave to amend. The Court concludes that there is no basis for granting Plaintiffs Harmer and Gauer leave to amend. In reaching this conclusion the Court adopts that summary of the facts set out in defendants' supplemental memorandum of points and authorities §II B and C(3) concerning Plaintiffs Harmer and Gauer. There is no doubt that as to said plaintiffs this is an "obscenity" case in which plaintiffs seek to enjoin exhibition of the picture "Deep Throat" for its alleged obscenity. As earlier determined by the Court, maintenance of this cause of action by said plaintiffs runs squarely into Harmer v. Tonylyn Productions, Inc., (1972) 23 Cal.App. 3d 941. (Plaintiffs simply are incorrect when they assert that Tonylyn "conflicts with California precedent in another District. (see Weiss v. Superior

Court of San Diego County, 30 Cal.App. 730....)". The Weiss case is completely distinguishable from Tonylyn and clearly is not in conflict).

Plaintiff Maiorino is in a different position. He owns property near the Defendant Pussy Cat Theater and possibly can state a cause of action in private nuisance. On amendment, the alleged obscenity of the picture "Deep Throat" will not form the basis for Plaintiff Maiorino's allegations of private nuisance.

DATED: September 21, 1973

DAVID A. THOMAS

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DEPT. 85

Date: September 21, 1973

HONORABLE David A. Thomas JUDGE
HONORABLE ~~\~~ JUDGE PRO TEM
Ed Harrold Deputy Sheriff

C Saunders Deputy Clerk 85
None Reporter

C 63814

John Harmer, et al.
vs.
A Motion Picture Film Entitled "Deep Throat"

NATURE OF PROCEEDINGS.

Demurrer to complaint by defendants Pussycat Theatres, Inc; Vincent Miranda; Frank N. Seltzer; Walter Seltzer; George Glass; Jay Fineberg; Jack Chazan; Walnut Properties, Inc.; Bette Lou Ledford; Robert Mattias; Jim Johnson; Pussycat Hollywood and Pussycat Hollywood Theater

In this matter, heretofore taken under submission on September 14, 1973, the Court now makes the following ruling:

Demurrer is sustained without leave to amend concerning plaintiffs John Harmer and Raymond P. Gauer on grounds stated therein.

Order of Dismissal is prepared as to defendants concerning plaintiffs Harmer and Gauer, pursuant to CCP 581.3.

Demurrer is sustained with 30 days leave to amend concerning plaintiff Salvatore Maiorino, pursuant to grounds stated therein. Defendants to serve notice of ruling.

The amended complaint shall attempt to allege private nuisance. The aforesaid ruling made in accordance with Informal Memorandum signed and filed this date.

Copy of this order and Informal Memorandum mailed to counsel by U.S. Mail.

September 21, 1973 (1) Dept., 85

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JOHN HARMER, et al.,
PLAINTIFF(S)
vs.

A MOTION PICTURE FILM ENTITLED "DEEP THROAT", ETC., et al.,
DEFENDANT(S)

CASE NUMBER

C 63814

ORDER OF DISMISSAL

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 581.3 of the Code of Civil Procedure as to defendants Pussycat Theatres, Inc.; Vincent Miranda; Frank N. Seltzer; Walter Seltzer; George Glass; Jay Fineberg; Jack Chazan; Walnut Properties, Inc.; Bette Lou Ledford; Robert Mattias; Jim Johnson; Pussycat Hollywood and Pussycat Hollywood Theater on the Complaint of John Harmer and Raymond P. Gauer, only.

It is further ordered that the above-named defendants have and recover costs against plaintiffs John Harmer and Raymond P. Gauer, only in the sum of

DATED: September 21, 1973

David A. Thomas
Judge

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN HARMER, RAYMOND P. GAUER, SALVATORE MAIORINO, Plaintiffs and Appellants, A MOTION PICTURE FILM ENTITLED "DEEP THROAT" (35 mm. Color, English Sound Tract); VANGUARD FILMS, INC.; GERARD DAMIANO a.k.a. JERRY GERARD; LOUIS PERAINO a.k.a. LOU PERRY; GERARD DAMIANO FILM PRODUCTIONS, INC.; PHIL PARISI; AQUARIUS RELEASING CO., INC.; TERRY LEVINE; PUSSYCAT THEATRES, INC.; VINCENT MIRANDA; FRANK N. SELTZER; WALTER SELTZER; GEORGE GLASS; JAY FINEBERG; JACK CHAZAN; WALNUT PROPERTIES, INC.; ERNEST RICORD; BETTE LOU LEDFORD; ROBERT MATTIAS; JIM JOHNSON; PUSSYCAT HOLLYWOOD; PUSSYCAT (HOLLYWOOD) THEATRE; DOES 1 through 11, Defendants and Respondents.	2d Civil No. 43913 (Sup.Ct. No. C 63814)

APPEAL from orders of the Superior Court of Los Angeles County. David A. Thomas, Judge. Affirmed.

James J. Clancy for Plaintiffs and Appellants.

Fleishman, McDaniel, Brown & Weston

and David M. Brown for Defendants and Respondents.

Plaintiffs originally brought this action to enjoin the further showing of the motion picture "Deep Throat" by defendant Pussycat Hollywood Theatre (Pussycat) on the ground that the performances constitute a public nuisance and are violative of the California Red Light Abatement Law (Pen. Code, § 11225, et seq.). The trial court sustained a demurrer to the complaint against all three plaintiffs — without leave to amend as to Harmer and Gauer, and granting 30 days leave to amend as to Maiorino and thereafter entered order dismissing the complaint as to Harmer and Gauer (§ 581, subd. 3, Code Civ. Proc.). Earlier the trial court had entered order denying preliminary injunction. Although the notice of appeal states that all three plaintiffs appeal from both orders, we do not consider Maiorino to be a party to the appeal from the order of dismissal.[1/]

1/ Although the court file does not contain any amended complaint by Maiorino, neither does it contain any judgment or order of dismissal in respect to him.

Defendants Vanguard Films, Inc.,

On March 27, 1975, this court affirmed both orders. Thereafter plaintiffs' petition for hearing before the California Supreme Court was granted. Subsequently, the Supreme Court transferred the cause to this court for reconsideration in the light of People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42. While Busch requires reformulation of our earlier opinion, careful consideration of that case reveals it to be supportive of the result reached therein.

ORDER OF DISMISSAL

First cause of action re public nuisance.

The allegations, all non-conclusionary portions of which we accept as true, aver: Plaintiffs (Harmer and Gauer) reside "in near proximity" to the Pussycat, which is located at 7734 Santa Monica Boulevard, Hollywood, and Gauer's place of business, 5670 Wilshire Boulevard, is in "near proximity" thereto. Defendant Pussycat Theatres, Inc., is a corporation of which Fineberg is president and Miranda secretary, and Miranda, the Seltzers and Glass are shareholders; and

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Gerard Damiano a.k.a. Jerry Gerard, Louis Peraino a.k.a. Lou Perry, Gerard Damiano Film Productions, Inc., Phil Parisi, Aquarius Releasing Co., Inc., Terry Levine and Ernest Ricord did not demur. The record does not reveal whether any were served with process or became parties to this action.

the corporation "is deriving substantial revenues from the operation of" the Pussycat, and is Miranda's alter ego. Defendant Chazan is the record owner of the real property on which the Pussycat is located; defendant Walnut Properties is a corporation of which Miranda and Ledford are directors, and Mattias and Johnson "managers and overseers," and which corporation "is deriving substantial revenues from the operation of" the Pussycat, and is also Miranda's alter ego. Defendant Pussycat Hollywood is a corporation of which Miranda is president and Frank Seltzer secretary, which corporation "is deriving substantial revenues from the operation of" the Pussycat, and is Miranda's alter ego.

Commencing November 30, 1972, and continuously thereafter, to and including the filing date of the complaint (August 3, 1973), "certain of the defendants" caused daily advertising of the film "Deep Throat" to be placed in the newspapers in the City of Los Angeles, and commencing on or about November 30, 1972, "Defendants have exhibited and are exhibiting publicly the aforementioned motion picture film at the Pussycat. . . . "; an accurate time and motion study of "Deep Throat" is provided as an exhibit, and the subject matter of the film is "unlawful and contraband being obscene and

a public nuisance under both state and federal laws" (italics ours); the film "(1) taken as a whole appeals to a prurient interest in sex, (2) portrays in a patently offensive way sexual conduct . . . demonstrated by the following visual depictions. . . ." (thereafter follows a list of various acts, including multiple references to cunnilingus, sexual intercourse, sodomy, fellatio and masturbation); "the near proximity of such public nuisances to Plaintiffs' residences, places of business, and play areas of their minor children establishes the same as a private nuisance as to each of the Plaintiffs and their minor children. Special injury and damages have been and will be suffered by Plaintiffs from such exhibitions of 'Deep Throat'"; (thereafter follow averments of "shame, embarrassment and emotional distress" and subjection to "the attraction of criminal elements, undesirables, deviates, dropouts from society and immoral persons into the areas; the decrease in value of real property . . . erosion of the public morality of the local community . . . the higher probability of an increase in sexual promiscuity, venereal disease, divorce and illegitimate births among the members of the community, the attraction of similar unsavory and unwholesome businesses"; a deprivation of plaintiffs' and their

minor children's civil rights and special damages in the form of the expenses in time and money for bringing this action); "Each and all of the foregoing acts and conduct in the use of Defendants' property, for the purposes and in the manner aforesaid, interferes with the tranquility, peace and quiet, generally, of Plaintiffs and the citizens in nearby community; constitutes a wilful, malicious, unlawful, unwarranted and unreasonable use of Defendants' property to the extreme annoyance, disturbance, discomfort and harm of Plaintiffs, and is detrimental to the public good and to the common welfare; such acts are offensive to public decency, morals, peace and health and constitute nuisances which should forthwith be enjoined and abated." Plaintiffs pray that such nuisance be forthwith abated and enjoined; and "an accounting be made of all box office receipts at the Pussycat . . . and the same forfeited to the County of Los Angeles as contraband."

Second cause of action re Red Light Abatement Law violation.

The foregoing allegations in the first cause of action concerning the advertising of "Deep Throat," a time and motion study of the film, the various sexual acts observed and that the movie is obscene, are repeated.

Additionally it is alleged: "Each and all of the foregoing acts and conduct in the use of Defendants' property, for the purposes and in the manner aforesaid, interferes with the tranquility, peace and quiet, generally of Plaintiffs and citizens in nearby community; constitutes a wilful, malicious, unlawful, unwarranted and unreasonable use of Defendants' property to the extreme annoyance, disturbance, discomfort and harm of Plaintiffs, and it is detrimental to the public good and to the common welfare; such acts are offensive to public decency, morals, peace and health, and constitute nuisances which should forthwith be enjoined and abated." Plaintiffs pray "That the Court order a forfeiture of the leasehold interest for one year as is mandated by Penal Code Section 11230, or such lesser period as is authorized by Penal Code Section 11232"; defendants be enjoined from "possessing, advertising, or exhibiting the motion picture film 'Deep Throat'"; and an accounting be made of the box office receipts and the same forfeited to the County of Los Angeles as contraband.

We quickly dispose of the second cause of action. As they must, plaintiffs agree that People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, squarely decides the issue. That case holds that the provisions of the Red Light

Abatement Law "were not intended to apply, and do not apply, to the exhibition of obscene magazines and films." (17 Cal. 3d at p. 62.)

As to the first cause of action, which pleads that the showing of "Deep Throat" constitutes a public nuisance (under section 3480, Civil Code) which plaintiffs, as private citizens seek to enjoin and abate,[2/] section

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2/ Plaintiffs in their opening brief state they "seek herein to establish the lawful right of a citizen of this state to maintain in a civil action to abate, as a public nuisance: (1) a hard-core, pornographic motion picture film ('Deep Throat') which is now, has been and is about to be exhibited on the screen of a public theatre in the County of Appellants' residence, and (2) the building or place where said film is being exhibited."

Although the first cause of action contains express averments that plaintiffs were also the victims of a private nuisance (in a degree sufficient to permit them to bring this action to enjoin the public nuisance under section 3493, Civil Code) they concede that their cause of action is brought "as individuals residing in Los Angeles County." The trial court, after an evidentiary hearing and consideration of memoranda of fact and law addressed specifically to this issue expressly requested by it, found there to be insufficient special injury to constitute a private nuisance. Because there was substantial evidence in support of this determination, we regard these allegations as constituting mere legal conclusions which we are not compelled to accept as true.

3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." In relation thereto it is settled that a private citizen fails to plead a cause of action to enjoin a public nuisance unless he avers special injury to himself of a kind different from that suffered by the general public. In City Store v. San Jose - Los Gatos etc. Co., 150 Cal. 277, the Supreme Court said, in construing section 3493 and sustaining a judgment of dismissal following a demurrer sustained with leave to amend (plaintiff declined to amend), "In order, therefore, to warrant the maintenance of an action by a private individual to abate or restrain the construction of a public nuisance, it is not enough to allege that injury has been or will be sustained by him thereby, but it is essential that it appear by proper allegations in the complaint, to be supported by proof upon the trial, that this injury, is or will be, special in character to him -- that is, that such injury will not only be greater in degree, but will be different in kind from that sustained by the public generally." (P. 279.) In Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App.

3d 116, in affirming judgment of dismissal following the sustaining of a demurrer without leave to amend, the court said at pp. 123-124: "The remedies against a public nuisance, i.e., the redress for the wrong to the community, are by indictment or information, a civil action, or abatement. (Civ. Code, § 3491.) Adverting specifically to the remedy by way of a civil action, since this is the remedy with which we are here concerned, we apprehend the law of this state to be that such action is ordinarily properly left to the appointed representative of the community and may be maintained by a private person only if the public nuisance is specially injurious to him. (Court's italics.) (Civ. Code, § 3493; see Code Civ. Proc., § 731; and see Prosser on Torts (3d ed.) at p. 608.) Section 3493 of the Civil Code specifically provides that 'A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.' (Italics added.) The genesis of this rule is found in the common law which recognized that 'the action would lie if the plaintiff could show that he had suffered special damage over and above the ordinary damage caused to the public at large by the nuisance.' (Prosser on Torts (3d ed.)

at p. 608.)

"In applying the rule articulated in section 3493 to a particular case, cognizance must be taken as to whether the public nuisance alleged is also a private nuisance, since this factor is important in determining how the statute is to be applied. The difference becomes important in view of the fundamental principle that a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser on Torts (3d ed.) at p. 594.)

"Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public. (Court's italics.) (Citations.) Under this rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. (Citations.)"

Plaintiffs' inability to state the requisite special injury to themselves is most apparent when they characterize defendants'

activities as constituting a "moral nuisance." On the one hand they argue that where a moral nuisance per se is established as a matter of law, injury and harm to the general public are conclusively presumed. While that may be true, there is still lacking the special injury which would enable plaintiffs to seek abatement. On the other hand plaintiffs ask that we substitute for the statutory requirement of special injury only the necessity that there be a "bona fide adversarial dispute." However, on this matter the Legislature has already spoken in Civil Code section 3493.[3/]

In our previous opinion we stated

3/ Plaintiffs also ask us to adopt the dissent in Harmer v. Tonylyn Productions, Inc., 23 Cal.App. 3d 941 which declares that: "The . . . allegations of the complaint (essentially the same as those here) are sufficient to satisfy pleading requirements with respect to the element of special injury which is essential to establish appellants' capacity to maintain the action under Civil Code section 3493." (P. 949.) We note that the cause at bench has been before us on three prior occasions on petitions for writ of mandate, each of which was denied; and that the Supreme Court denied petition for hearing following denial on the third petition. We decline to follow plaintiffs' suggestion that we adopt their position under the guise of "judicial activism and judicial legislation."

that nowhere do we find support for the proposition "that private persons similarly situated to plaintiffs here may initiate and prosecute actions to enjoin the showing of obscene motion pictures as nuisances, at least without direct collaboration with public authorities." (Emphasis added.) We believe this same idea to be implicit in the Supreme Court's latest ruling on the subject: "Once a community through its public officials has determined that a particular display of obscene materials amounts to a public nuisance which is injurious to the safety and morals of that community, no valid reason exists why, adequate constitutional procedural safeguards being met, the remedy of civil abatement proceedings must be denied such community." (Emphasis added.) (People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42 at p. 55; see Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App. 3d 116, 123.)[4/]

4/ Plaintiffs' own citation of authorities from other jurisdictions is of little assistance to them. The cases typically name as plaintiff one or more public officials. To the extent that these cases might support the proposition that in the absence of special injury and without direct collaboration with public authorities an individual has standing to seek abatement as a nuisance of the public display of an obscene film, we are not bound thereby inasmuch as the

(Footnote continued on next page.)

We are not insensitive to plaintiff's quandary. They have witnessed the transformation of a pleasant residential neighborhood into what fairly can be described as a center of commercialized sex. There is no doubt that the inhabitants of the area view this as an unwelcome change; and it is not difficult to believe that the effects of this transformation are felt in neighboring areas and, in some sense, throughout the city as a whole. Paradoxically it is the very scope of the alleged harm that ultimately prevents plaintiffs from being able to state a cause of action. Commendably, plaintiffs have sought the aid of the law in dealing with what they see as a pervasive problem; there is no doubt in their minds that the law has been found wanting; however, the law is eminently capable of change. In recent years many legislatures have evidenced a growing willingness to confront pornography in its many forms, but this court cannot legislate nor can it reinterpret a law already authoritatively construed. Should the time now have arrived when the statutory requirement of special injury

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involved statutes differ from the California code sections here at issue. (Grolemund v. Cafferata, 17 Cal. 2d 679, 688; Estate of Riccomi 185 Cal. 458, 463; Bachman v. Independence Indemnity Co., 112 Cal.App. 465, 482.)

is to be read out of the law because of an allegation of moral nuisance, that pronouncement, with its potentially grave constitutional ramifications, must come from our Supreme Court.

ORDER DENYING PRELIMINARY INJUNCTION

On September 4, 1973, the trial court entered its minute order stating "The motion for preliminary injunction and for forfeiture (of the box office receipts) is denied." All three plaintiffs have included this order in their notice of appeal. Because thereafter on September 21, 1973, the trial court entered its order of dismissal based on its determination that the complaint and each of its counts does not state a cause of action, which adjudication we have affirmed, the propriety of the earlier denial of injunctive relief is thereby established as a matter of law. Nevertheless, even without the subsequent dismissal we would have been required to affirm the trial court's order of September 4, under the settled rule that "'(T)he granting or denial of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that the order may not be interfered with on appeal, except for an abuse of discretion.'

(Citation.)" (Weingand v. Atlantic Sav. & Loan Assn., 1 Cal. 3d 806, 820; Continental Banking Co. v. Katz, 68 Cal. 2d 512, 527.) (And see U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal.App. 3d 68, 79.)

During their first oral argument before this court plaintiffs urged that the trial court abused its discretion, at least in denying Maiorino's motion for preliminary injunction, predicating their position on his testimony that the Pussycat Theatre is located "350 feet from the corner" where the home which he owns and in which he resides is situated. They contended that even if Maiorino had not shown any particular injury suffered by him different in kind from the general public,[5/] the mere proximity of his

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5/ We have carefully reviewed Maiorino's testimony and the only showing of particular injury we find therein is that patrons of the Pussycat had at times deposited litter "with the Pink Pussycat label on it, cartons of Dixie Cups, soda and pop that they purchased at the Pussycat Theater. . . .", on his property. However, there was no demonstration that this would not have occurred had the Pussycat shown exclusively G-rated films; and plaintiffs have not urged that the closing of the Pussycat -- rather than the invocation of some procedure less violative of the First Amendment safeguards to insure that the theater's patrons control their litter -- was compelled on this ground.

real property to the site of the public nuisance was sufficient in and of itself, to compel the court to grant the preliminary injunction, citing Venuto v. Owens-Corning Fiberglass Corp., 22 Cal. App. 3d 116. We find nothing in Venuto to support the theory that mere proximity of a plaintiff's real property to the situs of a public nuisance is sufficient to compel the trial court to grant injunctive relief abating the nuisance.

We agree that the necessary special injury may arise out of close proximity to a public nuisance; indeed plaintiff Maiorino consistently was granted leave to amend his complaint because of the fact of his ownership of property

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Maiorino also testified that he was "embarrassed by the presence of that film fare" in his neighborhood; the advertising sign on the theater was "offensive" to him; and "we don't even invite friends and associates to our house any more, because it is -- its just an unsavory neighborhood." But his further testimony, particularly on cross-examination, disclosed that he personally had never seen the film, and his overall "embarrassment" also stemmed from the presence in the area of a substantial number of other sex-oriented businesses of various types, all but two of which had commenced operation years before the initial showing of "Deep Throat". He testified that he had paid $19,700 for his home; but he also said that a house next door (we assume similar in value) had just sold for $25,000.

near the Pussycat Theatre. However, neither the cases cited by plaintiffs (Fisher v. Zumwalt, 128 Cal. 493, and Wade v. Campbell, 200 Cal.App. 2d 547), nor similar cases to the same effect hold that mere proximity to a public nuisance translates into special injury. Properly understood, these cases indicate that proximity to a public nuisance may be a condition enabling a plaintiff to demonstrate that an injury to the public is special as to him, not that proximity necessarily entails such special injury.

The orders are affirmed.

LILLIE, J.

We concur:

WOOD, P.J.

THOMPSON, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 3 1977

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 43913

Harmer

vs.

"Deep Throat"

Respectfully,

G. E. BISHEL
Clerk

48703-877 9-76 3M OSP

APPENDIX B

Unreported opinion of the Court of Appeal, Second Appellate District, Division 3, in Harmer, et al. v. "The Devil in Miss Jones, et al., 2d CIV 43778 . . . . . B-1 - B-21

Order of the California Supreme Court dated November 12, 1976 denying the petition for hearing . . B-22

NOT FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JOHN HARMER, RAYMOND P. GAUER, RICHARD WALTON, Plaintiffs and Appellants, v. A MOTION PICTURE FILM ENTITLED "THE DEVIL IN MISS JONES," et al., Defendants and Respondents.	2d Civil No. 43778 (Sup. Ct. No. C 63815)

APPEAL from a judgment of the Superior Court of Los Angeles County. David A. Thomas, Judge. Reversed.

James J. Clancy, for Plaintiffs and Appellants.

Miller, Glassman & Browning, Inc., and Anthony Michael Glassman; and Willard M. Reisz, for Defendants and Respondents.

Plaintiffs appeal from a judgment of dismissal after defendants' general demurrer was sustained without leave to amend. The complaint contains five causes of action and the sole ground of demurrer to each cause of action was failure to state sufficient facts to constitute a cause of action. As its title and prayer indicate, the complaint seeks to maintain a private suit in equity to abate public nuisances and a

declaratory judgment action. It is 73 pages in length (increased to 123 pages by exhibits) and it seeks relief against (1) a motion picture entitled "The Devil In Miss Jones," (2) a variety of persons who allegedly produced and released it for exhibition in the County of Los Angeles, (3) the operators of four so-called "adult" theatres currently and continuously exhibiting the film, and (4) persons having interests in the real property upon which the said theatres are located.

The first cause of action is directed at the motion picture itself and seeks to abate it as a public nuisance and to obtain a declaratory judgment that it is obscene matter. The motion picture is described in the complaint, in time and motion studies and in a continuity attached thereto, in a manner which (assuming such descriptions are accurate, as the demurrer admits) establishes that it is hard-core pornography and is obscene.

The second through fifth causes of action, respectively, are directed against each of the four theatres allegedly advertising and publicly exhibiting the subject film. They ask for the abatement of the theatres being so conducted as public nuisances under the general nuisance law (Civ. Code, §§ 3479, 3480)

and pursuant to the provisions of the Red Light Abatement Law (Pen. Code, §§ 11225-11235), as well as for declaratory relief as to the status of the property and the obscenity of the film.

The exhibition of the motion picture at each of these theatres is alleged to have been going on continuously for a period of several weeks during which the operators consistently advertised the theatres as purveyors of the "Tops in First Run Adult Entertainment, Always."

To support the standing of the various plaintiffs to maintain a private suit to abate the film itself and the four theatres' exhibition thereof as a public nuisance, the complaint alleges that plaintiff Harmer is a State Senator representing a legislative district in Los Angeles County and that he resides in such county and "in near proximity" to each of the four theatres exhibiting the film. The locations of the theatres are set forth: (1) on La Cienega Boulevard in Hollywood, (2) on Hollywood Boulevard in Hollywood, (3) on Wilshire Boulevard in Santa Monica, and (4) on Ventura Boulevard in Tarzana, all within the County of Los Angeles. The remaining plaintiffs are similarly alleged to be "residing in near proximity" to the said four theatres. In addition, in paragraphs 32 and 33 of the complaint, plaintiffs allege the

conclusion that "the near proximity of such public nuisances to (their) residences, places of business, and play areas of their minor children establishes the same as a private nuisance as to each of the Plaintiffs and their minor children." Further "(s)pecial injury and damages" are alleged consisting of plaintiffs being offended, outraged, shamed and embarrassed by the daily exhibition and advertisement of pornography in their community and being "subjected to the direct and indirect consequences" of such activity including the attraction of criminal elements, decrease in value of real property, erosion of public morality, higher probability of sexual promiscuity and venereal disease, divorce and illegitimate births among members of the community, and the attraction of similar unsavory and unwholesome businesses thereto.

In addition, with respect to causes of action two through five, plaintiffs base their standing to sue upon the provisions of Penal Code section 11226, authorizing any citizen residing within the county to sue for the abatement of a "place used for the purpose of . . . lewdness."

The trial court sustained the general demurrer to each of the five causes of action

on the authority of Harmer v. Tonylyn Productions, Inc., 23 Cal.App. 3d 941, which it construed as foreclosing plaintiffs from showing that the continuous exhibition of a motion picture film, however obscene, in a closed theatre to which only consenting adults were admitted either (1) was a public nuisance under sections 3479 and 3480 of the Civil Code, or (2) made the theatre in which such exhibition occurred a "place used for the purpose of . . . lewdness, assignation, or prostitution," under Penal Code section 11225. For this reason the court did not pass upon the sufficiency of the allegations of paragraphs 32 and 33 of the complaint to show plaintiffs' standing to maintain a private suit to abate a public nuisance as persons specially injured.[1/]

Plaintiffs contend in a 127-page brief that Harmer v. Tonylyn, supra, should be overruled or distinguished and that they have alleged

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1/ The Court said in this respect: " . . . This paragraph 33 becomes significant only if we first decide that the matter is -- I first decide that the showing is a public nuisance, after which we would go to the second issue of determining whether the particular defendant (sic) can show that special injury which allows him to abate privately a public nuisance; but because we never get beyond the first issue, the pleadings in paragraph 33 are irrelevant.

facts upon which both the motion picture "The Devil In Miss Jones" and the theatres exhibiting it may be found to be public nuisances subject to abatement by their suit as persons specially injured. Respondents are content to rely upon the Harmer case and have filed a single six-page brief asserting its applicability and continued vitality. The basic issue presented by this appeal is, therefore, the effect of the decision in Harmer upon plaintiffs' claim that the motion picture and the exhibition of it in defendants' theatres constitute a public nuisance under the provisions of sections 3479 and 3480 of the Civil Code and section 370 of the Penal Code, and upon plaintiffs' contention that the exhibition of the said picture in defendants' theatres makes them places "used for the purpose of . . . lewdness, assignation, or prostitution," under section 11225 et seq. of the Penal Code.

The first such question has already been disposed of by our Supreme Court in People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42. In Busch, the court held that complaints containing allegations that the defendant adult theatres were exhibiting on a continuous basis obscene motion pictures, which allegedly constituted public nuisances,

brought by the District Attorney and City Attorney, were sufficient to survive general demurrers for failure to state causes of action. For reasons more fully stated in the opinion in that matter, our Supreme Court disapproved Harmer in this respect, stating "there is no overriding principle of law which precludes the states from regulating the exhibition of obscene matter by application of their public nuisance statutes." (17 Cal. 3d at p.55.) There is no need in this unpublished opinion to repeat what was said in Busch. It is sufficient to state that, as applied to this case, that decision compels the conclusion that the allegations of the complaint herein are sufficient to describe activity constituting a public nuisance. Consequently, the basis upon which the trial court sustained the demurrers without leave to amend did not justify that ruling.

The decision in Busch, however, establishes merely that a public nuisance is sufficiently alleged. The plaintiffs in that case were the District Attorney and City Attorney and, as such, were authorized to bring actions to abate public nuisances. The plaintiffs in this case, however, have no such status, and in order to state a cause of action to abate a public nuisance, they are required to show that they are

persons who are specially injured:

> "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." (Civ. Code, § 3493.)[2/]

In the instant case, plaintiffs' allegations of purported special injury, above described, are also inadequate to meet the requirements for the maintenance of a private suit to enjoin a public nuisance. By claiming that all of the plaintiffs reside in "near proximity" to all four theatres, the locations of which are alleged to be separated by as much as 15 miles, plaintiffs reveal that the character of their injury by reason of "proximity" is no different than that suffered by the population of Los Angeles County in general. The other allegations of outrage, embarrassment and shame, the consequences of the attraction of undesirables, general decrease in values, erosion of morality, and the attraction of other immoral activities also clearly describe injury no different in character than that suffered by the general public.

2/ In Busch, Harmer was not disapproved insofar as it held that "plaintiff (private citizens) had failed to allege the necessary special damages requisite to bringing a public nuisance action (see Civ. Code, § 3493) this casting doubt upon his status as a litigant." (17 Cal. 3d at p. 52.)

Such injury is not special injury justifying departure from the policy of this state which leaves the enforcement of the nuisance law in the hands of the public prosecutor in the local community. A recent statement of this policy is contained in Venuto v. Owens-Corning Fiberglass Corp., 22 Cal.App. 3d 116. In that case a plaintiff claiming special injury from air pollution, by virtue of his preexisting allergies and respiratory disorders, was held not to have standing to sue. The court said (at pp. 123-124):

> "The remedies against a public nuisance, i.e., the redress for the wrong to the community, are by indictment or information, a civil action, or abatement. (Civ. Code, § 3491.) Adverting specifically to the remedy by way of a civil action, since this is the remedy with which we are here concerned, we apprehend the law of this state to be that such action is ordinarily properly left to the appointed representative of the community and may be maintained by a private person only if the public nuisance is specially injurious to him. (Civ. Code § 3493; see Code Civ. Proc., § 731; and see Prosser on Torts (3d ed.) at p. 608.) Section 3493 of the Civil Code specifically provides that 'A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.' (Italics added.) The genesis of this rule is found in the common law which recognized that 'the action would lie if the plaintiff could show that he had suffered special

damage over and above the ordinary damage caused to the public at large by the nuisance.' (Prosser on Torts (3d ed.) at p. 608.)

"In applying the rule articulated in section 3493 to a particular case, cognizance must be taken as to whether the public nuisance alleged is also a private nuisance, since this factor is important in determining how the statute is to be applied. The difference becomes important in view of the fundamental principle that a private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large. (Prosser (sic) on Torts (3d ed.) at p. 594.)

"Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public. (Ward v. Oakley Co., 125 Cal.App. 2d 840, 850 (271 P.2d 536); Donahue v. Stockton Gas etc. Co., 6 Cal.App. 276,279, 280 (92 P. 196); Wallace v. MacDonough Theater Co., 34 Cal.App. 498, 499 (168 P. 144); Voorheis v. Tidewater Southern Ry. Co., 41 Cal.App. 315, 320 (182 P. 797); Hitch v. Scholle, 180 Cal. 467, 468-469 (181 P. 657); Frost v. City of Los Angeles, 181 Cal. 22, 24 (183 P. 342, 6 A.L.R. 463); Brown v. Rea, 150 Cal. 171, 174 (88 P. 713); Thompson v. Kraft Cheese Co., 210 Cal. 171, 178 (291 P. 204).) Under this

rule the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public. (Voorheis v. Tidewater Southern Ry Co., supra; Brown v. Rea, supra; Donahue v. Stockton Gas etc. Co., supra; see Prosser on Torts (3d ed.) at pp. 608-609.)"

By contrast, Donahue v. Stockton Gas etc. Co., 6 Cal.App. 276, illustrates the kind of special injury which does justify a private action to abate a public nuisance. There an escaping gas, which polluted the atmosphere, thereby injuring the public in general, also poisoned the soil and the soil water on the plaintiff's adjoining parcel. Sustaining the plaintiff's standing to sue, the court said (at pp. 279-280):

"It is contended by respondent that the complaint discloses a public nuisance and that no clear case of special damages is shown so as to entitle plaintiff to maintain the action. The law is well settled that a private person, to have any standing in an action of this character, must show that he has suffered not only special injury but of a different kind from that of the public and not simply a difference in degree. (Civ. Code, secs. 3480, 3493; Jarvis v. Santa Clara Val. R. R. Co., 52 Cal. 438; Bigley v. Nunan, 53 Cal. 403; McCloskey v. Kreling, 76 Cal. 512, (18 Pac. 433); Siskiyou Lumber & Mercantile Co. v. Rostel, 121 Cal. 511, (53 Pac. 1118); Reynolds v. Presidio R. R. Co., 1 Cal.App. 229, (81 Pac. 1118).) But it is obvious from an

inspection of the complaint that this criticism applies to the pollution of the atmosphere and not to the injury done to the soil and the water. The former is suffered in common by a large part of the community, as expressly appears by the allegation; 'And the same corrupts, pollutes and poisons the entire atmosphere in that section of said city of Stockton.' The following qualification, 'and especially that portion that belongs to plaintiff and that by reason thereof the plaintiff's premises have been injured and depreciated in value' may indicate an injury different in degree from that of the public, but it is of no importance in the attempt to state the special damage required by the statute and the decisions. This is apparent from the cases already cited. Hence, if this were the only charge made against defendant it is clear that a general demurrer to the complaint would lie. But the other injury of which complaint is made is not shared by the public at all. This appears from the location of plaintiff's premises and also by explicit averment. That this portion of the complaint in reference to the pollution of the soil and water states a cause of action is clear from the authorities. It is charged in specific language that defendant negligently and carelessly constructed its works and has operated them in such an inefficient manner as to pollute the water on plaintiff's premises, and to injure and poison the soil so that it is rendered un-

unproductive and the particular loss occasioned is pointed out. In that regard plaintiff has stated every material fact necessary to constitute a cause of action."

See also Farmer v. Behmer, 9 Cal.App. 773, where the next door neighbor of a house of prostitution was held to be specially injured when she was obliged to listen to the loud profanity of its inmates, to view them indecently exposing themselves at the windows and to suffer the disturbance of drunken conduct of the customers at late hours.

As applied to a motion picture claimed to be a public nuisance, the same requirement is stated in Wallace v. MacDonough Theater Co., 34 Cal.App. 498. In that case persons who alleged that they found the film "Birth of a Nation" specially injurious because, as blacks, they were held up to "public ridicule and contumely" and subjected to the effects of "general race hatred between the white and negro races" were held not specially injured because they showed no "special injury to themselves aside from and independent of the general injury to the public."

The purported special injury alleged by plaintiffs is not "of a character different in kind from that suffered by the general public"; it does not establish their standing to

sue.

Plaintiffs' reliance upon the Red Light Abatement Law to establish their standing is likewise misplaced. Penal Code section 11226 does provide that "any citizen of the State resident within said county" may maintain an action to abate any nuisance coming within the provisions of section 11225. In People ex rel. Busch v. Projection Room Theater, supra, 17 Cal. 3d 42, 62, the court held that the provisions of the Red Light Abatement Law were not "intended to apply, and do not apply, to the exhibition of obscene magazines or films." This disposes of plaintiffs' contention.

There remains, however, one further basis upon which plaintiffs assert standing to have the questions of obscenity and public nuisance posed by the exhibition of "The Devil In Miss Jones" determined. All five causes of action seek declaratory relief declaring the motion picture obscene and not entitled to First Amendment protection.

Section 1060 of the Code of Civil Procedure provides that "in cases of actual controversy relating to the legal rights and duties of the respective parties" any person who desires a declaration of his rights or duties with respect to another may bring an

original action in the superior court for a declaration of his rights and duties. Two problems are posed by plaintiffs' reliance upon the declaratory judgment procedure. The first problem is that plaintiffs have not alleged the existence of a controversy. There is no allegation at any point in their complaint to the effect that defendants or any of them deny that the motion picture is obscene or deny that the exhibition of it is a public nuisance.

Moreover, even if a controversy were alleged, a question would exist as to plaintiffs' standing to maintain the action. In addition to stating a controversy, declaratory relief plaintiffs are required to allege facts showing some relationship to the controversy by virtue of which its solution will affect their substantial legal rights. Though it is true that in respect of matters of such general concern as the world's deteriorating environment the plaintiff need not have a direct property interest, facts must be alleged showing the existence of a greater or different interest than that of the members of the public in general In Residents of Beverly Glen, Inc. v. City of Los Angeles, 34 Cal.App. 3d 117, a nonprofit corporation whose members owned property in the area was held to have standing to maintain a declaratory relief

action testing the validity of an ordinance pursuant to which the city had granted a conditional use permit for development which allegedly would have caused an adverse effect upon the environment. Upholding the plaintiff's standing to sue, the court said:

> "In reaching our conclusions, we first note that environmental concerns underlie this action. Such matters are the proper subject of judicial consideration. '. . . Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' (Sierra Club v. Morton, 405 U.S. 727, 734 (31 L.Ed.2d 636, 643, 92 S.Ct. 1361).) Quoting this language, the California Supreme Court further referred to Sierra Club when it said, '. . . In dissenting Justice Blackmun decried rigidity of the law that prevented reaching issues involving significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances" (405 U.S. at p. 755 . . .).' (Italics supplied.) (Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 254 (104 Cal.Rptr. 761, 502 P.2d 606, 1049).) See also Associated Home Builders etc., Inc. v. City of Walnut Creek, 4 Cal. 3d 633 (94 Cal.Rptr. 630, 484 P. 2d 606, 43 A.L.R. 3d 847).

"In recent years there has been a marked accommodation of formerly strict procedural requirements of standing to sue (Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276 (32 Cal.Rptr. 830, 384 P.2d 158)) and even of capacity to sue (Daniels v. Sanitarium Assn., Inc., 59 Cal. 2d 602 (30 Cal.Rptr. 828, 381 P.2d 652)) where matters relating to the 'social and economic realities of the present-day organization of society' (Daniels at p. 607) are concerned. Accordingly, we have seen a retreat from the formalism and rigidity referred to in Friends of Mammoth, supra. That process may be seen in several cases.

"Thus, Parker v. Bowron, 40 Cal. 2d 344 (254 P. 2d 6), another case principally relied upon by defendants, held that a plaintiff who claimed to represent city employees in a suit concerning their wages, by reason of the plaintiff's position as secretary-treasurer of an unincorporated association of unions whose members were city employees, had no right or interest in the subject matter himself and could not represent the employees. Yet, in Professional Fire Fighters, supra, the court distinguished Parker on the technical ground that Parker involved an unincorporated association, saying '(b)ut here, we have no question of an unincorpoated association, and no basis for a claim that the class for whom the action was brought is without beneficial interest.' (60 Cal. 2d at P. 284)."

(34 Cal.App. 3d at pp. 122-123.)

In a comparable situation, however, plaintiffs who alleged merely that they were citizens and taxpayers of the State of California were held not to have any standing to sue in declaratory relief to obtain a declaration that the Department of Public Health had the duty and authority to act with respect to air pollution despite the enactment of the Mulford-Tarrell Air Resources Act granting broad powers in that field to the California Air Resources Board. The court said in Zetterberg v. State Dept. of Public Health, 43 Cal.App. 3d 657, 662:

> "Plaintiffs' allegation that they are taxpayers does nothing to establish their standing to seek the relief sought and their complaint fails to set forth any circumstances indicating that as citizens of the state they have any greater or different interest in the subject than any other member of the body politic."

The standard applicable to determining the standing of a plaintiff to maintain a declaratory relief action was stated in general terms in California Water & Telephone Co. v. County of Los Angeles, 253 Cal.App. 2d 16, 22-23:

> "One who invokes the judicial process does not have 'standing' if he, or those

> whom he properly represents, does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented."10/

"10/ E.g., Jennings v. Strathmore Public Utility Dist. (1951) 102 Cal.App. 2d 548 (227 P. 2d 838) (plaintiff had no standing to challenge validity of contracts for construction of sewage system where his only interest was as a citizen and a potential worker on the project). See also Note, Judicial Determinations in Nonadversary Proceedings, 72 Harv. L. Rev. 722, 724 (1959); 1 Witkin, Cal. Procedure (1954) § 10, p. 497."

There can be no serious question that the determination of the obscenity or nonobscenity of a motion picture is an appropriate subject for declaratory relief. Such determinations were made in Zeitlin v. Arnebergh, 59 Cal. 2d 902, and in Landau v. Fording, 245 Cal.App. 2d 820. In Zeitlin a book seller and a prospective purchaser were held entitled to a declaratory judgment declaring "Tropic of Cancer" was not obscene. In Landau the party owning the distribution rights to a motion picture, the obscenity of which was in question, brought a declaratory relief action to determine its status with respect to the obscenity law. A judgment declaring the picture obscene was

affirmed on appeal. In both of the above cases, of course, the direct economic interests of the persons involved eliminated any question of standing. It would appear, therefore, that if plaintiffs allege the existence of a controversy, they may be able to establish standing to seek a declaratory judgment by alleging "injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented."

From what is said above, it follows that the demurrer to plaintiffs' complaint was properly sustained. Plaintiffs alleged facts sufficient, if proved, to show the existence of a public nuisance, but they did not alllege facts establishing their standing to maintain a private action to abate it. Plaintiffs also failed to allege the existence of a controversy in which they have an interest of sufficient magnitude to justify declaratory relief in their behalf. It does not, however, appear that under such circumstances the demurrer should have been sustained without leave to amend. Nothing in the complaint suggests that the plaintiffs cannot amend to show special injury sufficient to justify the maintenance of a private suit to abate a public nuisance or a controversy with a potential for substantial injury to them

justifying their maintenance of a declaratory relief action.

The judgment of dismissal is reversed; the cause is remanded to the trial court with instructions to grant plaintiffs a reasonable time within which to file an amended complaint.

POTTER, J.

We concur:

FORD, P.J.

ALLPORT, J.

B-22

ORDER DUE
November 16, 1976

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, Civil No. 43778

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

HARMER ET AL.

v.

A MOTION PICTURE FILM ENTITLED
"THE DEVIL IN MISS JONES" ET AL.

Appellants' Petition for hearing DENIED.

SUPREME COURT
FILED
NOV 12, 1976
G. E. BISHEL, Clerk

_____
Deputy

/s/ WRIGHT
Chief Justice

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of this Court this 14th day of February, A.D. 1976.

Clerk

By: /s/ R. D. BARROW
Deputy Clerk

APPENDIX C

Amendment I of the Constitution
of the United States C-1

Amendment X of the Constitution
of the United States C-1

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX D

California Penal Code Section 311(a) defining "obscene matter" . . . . . D-1 - D-2

CALIFORNIA PENAL CODE

Chapter 7.5

§311. (Definitions)

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its

prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

APPENDIX E

California Civil Code, Sections 3479 and 3480, containing the provisions defining what constitutes a public nuisance E-1

CALIFORNIA CIVIL CODE

§3479. (Nuisance, what)
Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

§3480. (Public nuisance)
A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

APPENDIX F

California Civil Code, Sections 3493 and 3495, authorizing the abatement of a public nuisance by a "private person" by a civil action and by other means (self-help) F-1

CALIFORNIA CIVIL CODE

§3493. Remedies for public nuisance.
A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise.

§3495. How abated.
Any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury.

APPENDIX G

California Code of Civil Procedure, Section 731, authorizing the filing of a civil public nuisance abatement action "by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance" G-1

CALIFORNIA CODE OF CIVIL PROCEDURE

§731. (Right to bring action to enjoin or abate nuisance, and to recover damages: Abatement of public nuisance)

An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city.

APPENDIX H

California Code of Civil Procedure, Section 527, containing the provisions relating to the granting of preliminary injunctions . . . . . H-1 - H-3

CALIFORNIA CODE OF CIVIL PROCEDURE

§527. (Time of granting injunction: Service: Preliminary injunction, notice, readiness for hearing, continuance, counter-affidavits and precedence)

An injunction may be granted at any time before judgment upon a verified complaint, or upon affidavits if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist therefor. A copy of the complaint or of the affidavits, upon which the injunction was granted, must, if not previously served, be served therewith.

No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice. In case a temporary restraining order shall be granted without notice, in the contingency above specified, the matter shall be made returnable on an order requiring cause to be shown why the injunction should not be granted, on the earliest day that the business of the court will admit of, but not later than 15 days or, if good cause appears to the court, 20 days from the date of such order.

When the matter first comes up for hearing the party who obtained the temporary restraining order must be ready to proceed and must have served upon the opposite party at least two days prior to such hearing, a copy of the complaint and of all afficavits to be used in such application and a copy of his points and authorities in support of such application; if he be not ready, or if he shall fail to serve a copy of his complaint, affidavits and points and authorities, as herein required, the court shall dissolve the temporary restraining order. The defendant, however, shall be entitled, as of course, to one continuance for a reasonable period, if he desire it, to enable him to meet the application for the preliminary injunction. The defendant may, in response to such order to show cause, present affidavits relating to the granting of the preliminary injunction, and if such affidavits are served on the applicant at least two days prior to the hearing, the applicant shall not be entitled to any continuance on account thereof. On the day upon which such order is made returnable, such hearing shall take precedence of all other matters on the calendar of such day, except older matters of the same character, and matters to which special precedence may be given by law. When the cause is at issue,

it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

APPENDIX I

Rule 977 of the California Rules of Court, which precludes the citation of unreported decisions as precedent I-1

CALIFORNIA RULES OF COURT

Rule 977. Citation of unpublished opinions prohibited; exceptions.

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent.

EXHIBIT J

1911 Treaty, entitled "Agreement for the Suppression of the Circulation of Obscene Publications", 37 Stat. 1511-1515 . . . . . J-1 through J-5

Arrangement between the United States and other Powers relative to the repression of the circulation of obscene publications. Signed at Paris, May 4, 1910; ratification advised by the Senate, January 13, 1911; ratified by the President, February 4, 1911; ratification of the United States deposited with the Government of the French Republic March 15, 1911; proclaimed, April 18, 1911.

May 4, 1910.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Repression of obscene publications. Preamble.

Whereas an Arrangement between the United States of America and Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, France, Great Britain, Italy, The Netherlands, Portugal, Russia, and Switzerland relative to the suppression of the circulation of obscene publications, was concluded and signed by their respective Plenipotentiaries at Paris, on the fourth day of May, one thousand nine hundred and ten, the original of which Arrangement, being in the French language, is word for word as follows:

[Translation.]

ARRANGEMENT RELATIF À LA RÉPRESSION DE LA CIRCULATION DES PUBLICATIONS OBSCÈNES.	ARRANGEMENT RELATIVE TO THE REPRESSION OF THE CIRCULATION OF OBSCENE PUBLICATIONS.
Les Gouvernements des Puissances désignées ci-après, également désireux de faciliter, dans la mesure de leurs législations respectives, la communication mutuelle de renseignements en vue de la recherche et de la répression des délits relatifs aux Publications obscènes, ont résolu de conclure un Arrangement à cet effet et ont, en conséquence, désigné leurs Plénipotentiaires qui se sont réunis en Conférence, à Paris, du 18 avril au 4 mai 1910, et sont convenus des dispositions suivantes:	Contracting Powers. The Governments of the Powers hereinbelow named, equally desirous of facilitating within the scope of their respective legislation, the mutual interchange of information with a view to tracing and repressing offences connected with obscene publications, have resolved to conclude an arrangement to that end and have, in consequence, designated their plenipotentiaries who met in conference at Paris from April 18 to May 4, 1910, and agreed on the following provisions:
ARTICLE PREMIER.	ARTICLE 1.
Chacun des Gouvernements contractants s'engage à établir ou à désigner une autorité chargée:	Authority to be established. Each one of the Contracting Powers undertakes to establish or designate an authority charged with the duty of
1° De centraliser tous les renseignements pouvant faciliter la recherche et la répression des actes constituant des infractions à leur législation interne en matière d'écrits, dessins, images ou objets	Duties. (1) Centralizing all information which may facilitate the tracing and repressing of acts constituting infringements of their municipal law as to obscene writings, drawings, pictures or articles, and

obscènes, et dont les éléments constitutifs ont un caractère international;

2° De fournir tous renseignements susceptibles de mettre obstacle à l'importation des publications ou objets visés au paragraphe précédent comme aussi d'en assurer ou d'en accélérer la saisie, le tout dans les limites de la législation interne;

3° De communiquer les lois qui auraient déjà été rendues ou qui viendraient à l'être dans leurs États, relativement à l'objet du présent Arrangement.

Notification to contracting Governments.

Les Gouvernements contractants se feront connaître mutuellement, par l'entremise du Gouvernement de la République française, l'autorité établie ou désignée conformément au présent article.

ART. 2.

Direct correspondence.

L'autorité désignée à l'article 1er aura la faculté de correspondre directement avec le service similaire établi dans chacun des autres États contractants.

ART. 3.

Communication of bulletins.

L'autorité désignée à l'article 1er sera tenue, si la législation intérieure de son pays ne s'y oppose pas, de communiquer les bulletins des condamnations prononcées dans ledit pays aux autorités similaires de tous les autres États contractants, lorsqu'il s'agira d'infractions visées par l'article 1er.

ART. 4.

Adhesion of other Powers.

Les États non signataires sont admis à adhérer au présent Arrangement. Ils notifieront leur intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

the constitutive elements of which bear an international character.

(2) Supplying all information tending to check the importation of publications or articles referred to in the foregoing paragraph and also to insure or expedite their seizure all within the scope of municipal legislation.

(3) Communicating the laws that have already been or may subsequently be enacted in their respective States in regard to the object of the present Arrangement.

The Contracting Governments shall mutually make known to one another, through the Government of the French Republic, the authority established or designated in accordance with the present Article.

ARTICLE II.

The authority designated in Article I shall be empowered to correspond directly with the like service established in each one of the other Contracting States.

ARTICLE III.

The authority designated in Article I shall be bound, if there be nothing to the contrary in the municipal law of its country, to communicate bulletins of the sentences passed in the said country to the similar authorities of all the other Contracting States in cases of offences coming under Article I.

ARTICLE IV.

Non-Signatory States will be permitted to adhere to the present Arrangement. They shall notify their intention to that effect by means of an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through diplomatic channel a certified copy of the said instrument to each one of the Contracting States and shall at the same time apprize them of the date of deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans l'ensemble du territoire de l'État adhérent, qui deviendra ainsi État contractant.

ART. 5.

Effect.

Le présent Arrangement entrera en vigueur six mois après la date du dépôt des ratifications.

Denunciation by one Power.

Dans le cas où l'un des États contractants le dénoncerait, cette dénonciation n'aurait d'effet qu'à l'égard de cet État.

La dénonciation sera notifiée par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera en même temps de la date du dépôt.

Douze mois après cette date, l'Arrangement cessera d'être en vigueur dans l'ensemble du territoire de l'État qui l'aura dénoncé.

ART. 6.

Ratification.

Le présent Arrangement sera ratifié, et les ratifications en seront déposées à Paris dès que six des États contractants seront en mesure de le faire.

Il sera dressé de tout dépôt de ratifications un procès-verbal, dont une copie, certifiée conforme, sera remise, par la voie diplomatique, à chacun des États contractants.

ART. 7.

Enforcement in colonies, etc.

Si un État contractant désire la mise en vigueur du présent Arrangement dans une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires, il notifiera son intention à cet effet par un acte qui sera déposé dans les archives du Gouvernement de la République française. Celui-ci en enverra, par la voie diplomatique, copie certifiée conforme à chacun des États contractants et les avisera, en même temps, de la date du dépôt.

Six months after that date the Arrangement will go into effect throughout the territory of the adhering State which will thereby become a Contracting State.

ARTICLE V.

The present Arrangement shall take effect six months after the date of deposit of the ratifications.

In the event of one of the Contracting States denouncing it, the denunciation would only have effect in regard to that State.

The denunciation shall be notified by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy thereof to each one of the Contracting States and at the same time apprize them of the date of deposit.

Twelve months after that date the Arrangement shall cease to be in force throughout the territory of the denouncing State.

ARTICLE VI.

The present Arrangement shall be ratified and the ratifications shall be deposited at Paris as soon as six of the Contracting States shall be in position to do so.

A procès verbal of every deposit of ratifications shall be drawn up and a certified copy thereof shall be delivered through the diplomatic channel to each one of the Contracting States.

ARTICLE VII.

Should a Contracting State wish to enforce the present Arrangement in one or more of its colonies, possessions or consular court districts, it shall notify its intention to that effect by an instrument which shall be deposited in the archives of the Government of the French Republic. The said Government shall send through the diplomatic channel a certified copy to each one of the Contracting States and at the same time apprize it of the date of the deposit.

Six mois après cette date, l'Arrangement entrera en vigueur dans les colonies, possessions ou circonscriptions consulaires judiciaires visées dans l'acte de notification.

La dénonciation de l'Arrangement par un des États contractants pour une ou plusieurs de ses colonies, possessions ou circonscriptions consulaires judiciaires s'effectuera dans les formes et conditions déterminées à l'alinéa 1er du présent article. Elle portera effet douze mois après la date du dépôt de l'acte de dénonciation dans les archives du Gouvernement de la République française.

ART. 8.

Date of signature.

Le présent Arrangement, qui portera la date du 4 mai 1910, pourra être signé à Paris, jusqu'au 31 juillet suivant, par les Plénipotentiaires des Puissances représentées à la Conférence relative à la répression de la circulation des Publications obscènes.

Fait à Paris, le quatre mai mil neuf cent-dix, en un seul exemplaire, dont une copie conforme sera délivrée à chacun des Gouvernements signataires.

Pour l'Allemagne:
Signé:
(L. S.) ALBRECHT LENTZE.
(L. S.) CURT JOËL.

Pour l'Autriche et pour la Hongrie:
Signé:
(L. S.) A. NEMES,
Chargé d'Affaires d'Autriche-Hongrie.

Pour l'Autriche:
Signé:
(L. S.) J. EICHHOFF,
Conseiller de Section Imperial Royal autrichien.

Pour la Hongrie:
Signé:
(L. S.) G. LERS,
Conseiller ministeriel Royal hongrois.

Pour la Belgique:
Signé:
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

Pour le Brésil:
Signé:
(L. S.) J. C. DE SOUZA BANDEIRA.

Six months after that date the Arrangement shall go into effect in the colonies, possessions or consular court districts specified in the instrument of notification.

The denunciation of the Arrangement by one of the Contracting States in behalf of one or more of its colonies, possessions or consular court districts will be effected in the form and under the conditions set forth in the first paragraph of this Article. It will become operative twelve months after the date of the deposit of the instrument of denunciation in the archives of the Government of the French Republic.

ARTICLE VIII.

The present Arrangement which will bear date of May 4, 1910, may be signed at Paris until the following 31st of July by the Plenipotentiaries of the Powers represented at the Conference relative to the repression of the circulation of obscene publications.

Done at Paris, the fourth day of May one thousand nine hundred and ten in a single copy of which a certified copy shall be delivered to each one of the signatory Powers.

For Germany:
Signed
(L. S.) ALBRECHT LEUTZE.
(L. S.) CURT JOEL.

For Austria and Hungary:
Signed
(L. S.) A. NEMES,
Chargé d'Affaires of Austria-Hungary.

For Austria:
Signed
(L. S.) J. EICHHOFF,
Austrian Imperial and Royal Section Counselor.

For Hungary:
Signed
(L. S.) G. LERS,
Hungarian Royal Ministerial Counselor.

For Belgium:
Signed
(L. S.) JULES LEJEUNE.
(L. S.) ISIDORE MAUS.

For Brazil:
Signed
(L. S.) J. C. DE SOUZA BANDEIRA.

Pour le Danemark:
Signé:
(L. S.) C. E. COLD.

Pour l'Espagne:
Signé:
(L. S.) OCTAVIO CUARTERO.

Pour les États-Unis:
Signé:
(L. S.) A. BAILLY-BLANCHARD.

Pour la France:
Signé:
(L. S.) R. BÉRENGER.

Pour la Grande-Bretagne:
Signé:
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

Pour l'Italie:
Signé:
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

Pour les Pays-Bas:
Signé:
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

Pour le Portugal:
Signé:
(L. S.) COMTE DE SOUZA ROZA.

Pour la Russie:
Signé:
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DÉRUGINSKY.

Pour la Suisse:
Signé:
(L. S.) LARDY.

Pour copie certifiée conforme:
Le Ministre Plénipotentiaire, Chef du Service du Protocole,
ARMAND MOLLARD.

For Denmark:
Signed
(L. S.) C. E. COLD.

For Spain:
Signed
(L. S.) OCTAVIO CUARTERO.

For the United States:
Signed
(L. S.) A. BAILLY-BLANCHARD.

For France:
Signed
(L. S.) R. BÉRENGER.

For Great Britain:
Signed
(L. S.) E. W. FARNALL.
(L. S.) F. S. BULLOCK.
(L. S.) G. A. AITKEN.

For Italy:
Signed
(L. S.) J. C. BUZZATTI.
(L. S.) GEROLAMO CALVI.

For the Netherlands:
Signed
(L. S.) A. DE STUERS.
(L. S.) RETHAAN MACARE.

For Portugal:
Signed
(L. S.) COUNT DE SOUZA ROZA.

For Russia:
Signed
(L. S.) ALEXIS DE BELLEGARDE.
(L. S.) WLADIMIR DERUGINSKY.

For Switzerland:
Signed
(L. S.) LARDY.

Ratifications deposited.

And whereas, the said Arrangement has been duly ratified by the Governments of the United States, Germany, Belgium, Spain, France, Great Britain, Italy, and Switzerland, and the ratifications of the said Governments were, as provided for by Article 6 of the said Arrangement, deposited by their respective Plenipotentiaries with the Government of the French Republic on March 15, 1911;

Ante, p. 1513.

Proclamation.

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Arrangement to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this thirteenth day of April in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States of America the one hundred and thirty-fifth.

[SEAL]

WM H TAFT

By the President:
P C KNOX
Secretary of State.